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Supreme Court, U.S.
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No. 08-

IN THE
Supreme Court of the United States

ROBERT VIGIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the 10th Circuit erred in broadening the jurisdictional requirement under the Hobbs Act by holding that indirect depletion of an *individual's* potential assets affect interstate commerce.

2. Whether the 10th Circuit erred in holding that acts amounting to hard bargaining were a violation of the Hobbs Act when this holding conflicts with a prior, relevant decision of this Court reversing a decision of the 10th Circuit.

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OPINIONS BELOW

The January 12, 2007 and January 19, 2007 memorandum opinions and orders of the district court denying Petitioner's Motion to Set Aside Verdict and for Judgment of Acquittal are at App. B and App. C, respectively. Appellant filed a Petition for Writ of Mandamus with the Tenth Circuit on or about August 17, 2006. That action was identified by Court of Appeals No. 06-2230. The opinion of the Tenth Circuit, affirming the district court, is reported at 523 F.3d 1258 (10th Cir. 2008). (App. A).

STATEMENT OF JURISDICTION

Robert Vigil, the Petitioner before this Court, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit. Mr. Vigil was charged with several counts of violating the Hobbs Act, 18 U.S.C. § 1951, § 1952, and one count of attempted extortion under the Hobbs Act. Mr. Vigil was also charged with two counts of violations of the RICO Act under 18 U.S.C. § 1962. The district court based subject matter jurisdiction on 18 U.S.C. § 1951, § 1952. A jury convicted Mr. Vigil only of the single count of attempted extortion on September 30, 2006. The district court entered its judgment on February 22, 2007. The judgment of the court of appeals, affirming the district court was entered on April 29, 2008. (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 1254(1).

The Hobbs Act:

> Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by

means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.years, or both.

18 U.S.C. § 1951 (1994).

STATEMENT OF THE CASE

This case presents an important and fundamental question regarding the breadth of the Commerce Clause. Specifically, Petitioner asks this court to determine whether, under the Hobbs Act, interstate commerce is affected by the indirect depletion of an *individual's* assets. Additionally this case presents this Court with the opportunity to resolve a circuit split over the distinction between depletion of individual assets and depletion of corporate assets in regards to the Hobbs Act.

The interstate commerce clause was not intended to reach as far as the Tenth Circuit's interpretation. When assets are depleted from a corporate entity which is not yet engaged in commerce, that depletion does not impact interstate commerce. The circuit court's holding that the indirect depletion of an individual's potential future assets affects interstate commerce stretches the commerce clause beyond any reasonable interpretation. Stretching the meaning of interstate commerce has detrimental effects on the fundamental principles of federalism and the balance of power in our government. Such a holding blurs the lines separating state and federal government, over-expands federal power, and unconstitutionally grants Congress the power to regulate nearly every State's individual.

In addition to the significant constitutional issue, this case offers the Court the opportunity to resolve the conflict that the circuit court's decision creates with a relevant decision of this Court. Petitioner requests this Court's guidance to draw a distinction between what is

a Hobbs Act violation and what constitutes 'hard bargaining'. This case arises from the Tenth Circuit, the same circuit this Court reversed one year ago on the same issue involving the Hobbs Act. The circuit court's apparent refusal to apply Supreme Court precedent is yet another reason Petitioner respectfully requests this Court's review.

There has yet to be a case before this Honorable Court that presents the issue of whether interstate commerce is affected when an individual's resources are depleted under the Hobbs Act. Respectfully, it is ripe for this Court's determination.

Petitioner states that federal jurisdiction was present before the United States District Court for the District of New Mexico because he was charged under the Hobbs Act, a federal statute.

STATEMENT OF THE FACTS

I. Introduction

On July 25, 2006, a grand jury returned a Fifth Superseding Indictment, which charged Mr. Vigil with twenty-three counts of extortion under the Hobbs Act and alleged RICO violations and one count of attempted extortion under the Hobbs Act. On September 30, 2006, a jury acquitted Mr. Vigil on all counts of extortion and RICO, but convicted him on Count 24, which was the single count of attempted extortion.

Count 24 alleged that Mr. Vigil, the New Mexico State Treasurer during relevant times, attempted to

extort George Everage to provide "money and property" to a third person, Samantha Sais, in connection with the award of a new state contract for a potential securities lending program for New Mexico. The position sought by Everage would be known as the Securities Lending Oversight Manager ("SLOM"). Samantha Sais was the wife of Mr. Vigil's predecessor as Treasurer, Michael Montoya. George Everage, then an employee of the New Mexico State Treasurer's Office ("NMSTO" or "STO"), proposed the securities lending program to Mr. Vigil as a method of raising income. Everage described securities lending as a program where the STO would lend out securities that it held, such as agency bonds, and would earn additional income on those loans. Under Everage's proposal, the SLOM would oversee a number of security lending agents who would actually place the security lending investments. Before the STO could engage in any security lending through the SLOM position, there would have to have been a separate request for proposals from security lending agents (SLAs). Mr. Vigil decided that, due to budgetary restrictions, if the SLOM position were to be created, it would have to be someone outside the STO who would have a contract with the STO. Everage left the office of the State Treasurer to bid on the contract to oversee his proposed securities lending program as the oversight manager[1], acknowledging that the SLOM position could have been terminated by the STO at any time, should it get off the ground. Mr. Vigil refused to

1. Under New Mexico law, it is a misdemeanor for a government employee to participate in procuring contracts when that employee knows that he has a financial interest in the business seeking or obtaining the contract. N.M.S.A. §§ 13-1-190 & 13-1-199.

accept a proposal for the SLOM without a provision for the hiring of an information technology employee, Samantha Sais. Everage decided that he did not want to hire her. There was never a finalized SLOM contract as a result. Even had there been a finalized contract, several contingencies had to occur before the securities lending program would become operational in New Mexico and before a SLOM made any money.

Part of the government's theory in Count 24 was that Mr. Vigil attempted to extort George Everage as payback to Michael Montoya, pursuant to an illegal kickback scheme that Mr. Vigil previously had allegedly orchestrated with Montoya and other cohorts. This alleged scheme was the basis of the first twenty-three counts of the Fifth Superseding Indictment. The gist of the scheme was that the Treasurer's Office under Montoya would require contractors to pay "kickbacks" in exchange for the award of contracts with the State of New Mexico. Criminal associates Leo Sandoval and Angelo Garcia assisted Montoya to obtain the kickbacks, which were paid by various investment brokers including a man named Kent Nelson. The United States alleged that Mr. Vigil conspired with others to continue this alleged scheme when he took over as Treasurer. The United States' case was based primarily on the testimony of cooperating defendants Montoya, Sandoval, Garcia and Kent Nelson. After several weeks of trial, the jury resoundingly rejected this testimony and the government's theories by acquitting Mr. Vigil of Counts 1-23.[2] Only Count 24 was based on Mr. Vigil's dealings with George Everage.

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2. This was the second trial of this matter. The first trial ended in a mistrial after the jury was unable to reach a verdict on any of the indictment counts.

Mr. Vigil filed Motions to Set Aside the Verdict and for Judgment of Acquittal on October 5, 2006. The Court denied those Motions on January 12, 2007 and January 19, 2007. The Court's Orders are attached hereto as Appendices B & C. Mr. Vigil appealed his conviction for attempted extortion under 18 U.S.C. § 1951, § 1952 and the District Court's denial of his Motions for Judgment of Acquittal to the Tenth Circuit. That Court affirmed the judgment of the district court.

Pursuant to Supreme Court Rule 14(g)(ii), Petitioner states that federal jurisdiction was present before the U.S. District Court for the District of New Mexico because Petitioner was charged under the Hobbs Act, a federal statute.

II. Proceedings in the Underlying Criminal Case

A. No effect on interstate commerce

Mr. Vigil's conduct did not affect interstate commerce. Mr. Vigil, Ms. Saiz and Mr. Everage were and are all from the state of New Mexico. Mr. Everage proposed to perform professional oversight services as the Securities Lending Oversight Manager (SLOM) for the State Treasurer's Office.[3] Mr. Vigil's alleged wrongdoing in negotiating the terms of that SLOM contract with Everage in no way had even a minimal effect on interstate commerce.

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3. Following the trials, Mr. Everage filed a lawsuit against the State of New Mexico and Mr. Vigil for the underlying acts for which the United States Attorney's Office criminally charged Mr. Vigil. In that lawsuit, Mr. Everage averred for venue purposes that all of the acts giving rise to the lawsuit occurred in New Mexico. That lawsuit is pending before the U.S. District Court for the District of New Mexico as case number 07-CV-664.

The cases concerning Hobbs Act prosecutions generally fall within two categories. The first involves a direct connection between the extortion and interstate commerce, which is not at issue here. *See United States v. Mattson*, 671 F.2d 1020, 1023-24 (7th Cir. 1982). The second category involves the "depletion of assets" indirect effect upon interstate commerce. *Id.* at 1024. Within that category, the Seventh Circuit has distinguished Hobbs Act cases involving depletion of a business' assets from those involving an individual employee's assets, which are not likely to satisfy the jurisdictional requirement of the Hobbs Act. *Id.* (holding the extortion of a payment from an individual employed by Playboy Enterprises did not affect interstate commerce). Thus, the Court held in *Mattson* that

> (t)he victim in this case was an individual who had no connection with interstate commerce at all, but whose only connection was with a business which was engaged in interstate commerce. Thus, to find an effect on interstate commerce, we would be required not only to consider indirect effects within a single business entity, but also effects arising from the business entity's relationship with an employee not engaged in interstate commerce . . . The Hobbs Act requires that interstate commerce be affected by extortion, not by a result of extortion; there must be a nexus between extortion and interstate commerce before federal jurisdiction is present.

Mattson, 671 F.2d at 1025.

Other circuits have agreed that where the extortion or robbery of an individual has only an "attenuated" or "speculative" effect on some entity or group of individuals engaged in interstate commerce, there is no Hobbs Act jurisdiction. *See United States v. Lynch*, 282 F.3d 1049, 1054 (9th Cir. 2002) (distinguishing between the robbery and extortion of a business and the robbery and extortion of an individual under the Hobbs Act); *United States v. Wang*, 222 F.3d 234, 239 (6th Cir. 2000) ("a small sum stolen from a private individual does not, through aggregation, affect interstate commerce merely because the individual happens to be an employee of a national company . . ."); *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994) (conviction of robbery of a computer company employee reversed on grounds that theft of victim's automobile with cellular phone had an insufficient effect on his employer's business); *United States v. Quigley*, 53 F.3d 909 (8th Cir. 1995) (upholding the acquittal, following guilty verdict, of defendants who beat and robbed two individuals in route to buy beer at a liquor store); *United States v. Buffey*, 899 F.2d 1402, 1406 (4th Cir. 1990) ("Extorting money to be devoted to personal use from an individual does not affect interstate commerce"). Most recently, the Second Circuit overturned its own case law and held that the jury must determine that a robbery itself affected interstate commerce, not just that the robbery's object was drugs or the fruits of their distribution which by their nature affect interstate commerce. *United States v. Parkes*, __ F.3d __, 2007 WL 2317395 (2d Cir. 2007). There, the defendant took part in a scheme to rob a marijuana dealer of drugs and proceeds. He was charged with Hobbs Act robbery and the trial court instructed the jury that it had to find that the robbery

affected interstate commerce. The Court concluded that the district court properly instructed the jury that it must find that the robbery itself affected interstate commerce, not simply that the object of the robbery was to obtain illegal drugs or drug proceeds.

Likewise, Mr. Vigil's alleged extortion of Everage did not affect interstate commerce. In his opinion, Judge Kelly held that "the SLOM contract would have resulted in securities transactions between the STO and multi-state lending agents" and that "[a] rational jury could certainly conclude that Mr. Vigil's acts either actually or potential affected interstate commerce." *United States v. Vigil*, 523 F.3d 1258, 1266-67 (10th Cir. 2008). Appendix B. Without question, securities lending affects interstate commerce. Like in *Mattson*, Playboy Enterprises unquestionably affects interstate commerce. Like in *Parkes*, drugs are necessarily part and parcel of interstate commerce. The alleged extortion in this case, however, like in *Mattson* and *Parkes*, involved an individual, not a business engaged in the interstate economy. Judge Kelly concludes that Mr. Vigil "affected the operations of a business, SECSYS, LLC, formed by Everage." *Id.* at 1266. However, unlike in cases in which businesses are engaged in ongoing activities which impact interstate commerce, SECSYS LLC was merely an alter ego for Everage which had never done any business in interstate commerce. SECSYS was Everage, nothing more and it had done no business yet pending the SLOM contract. At the point in time that the SLOM negotiations failed, SECSYS was not doing any business in interstate commerce and nor was Everage. Mr. Vigil's actions at most affected Mr. Everage's personal assets, not a business involved in securities lending.

In *United States v. Perrotta*, 313 F.3d 33, 35 (2d Cir. 2002), the Defendant was convicted under the Hobbs Act for arranging an assault on a former business partner (Marcus) who worked at a business (FHB) that affected interstate commerce. The government offered evidence that FHB was a mortgage banking firm with clients located throughout the country; that Marcus ran a fifteen-to-twenty-person telemarketing unit; and even a one-day absence by Marcus would affect FHB's business. *Id.*

The Second Circuit, in reversing his conviction, held that merely showing employment with a company that does business in interstate commerce, without more, stretches the Hobbs Act too far. The Court explained that under such a theory, the extortion or assault of anyone who worked in any capacity at any company that participates in interstate commerce would suffice for federal jurisdiction, blurring the boundaries between state and federal jurisdiction. *Perrotta*, at 38, *citing*, *United States v. Collins*, 40 F.3d 95, 100 (5th Cir. 1994). The Court further held, that merely showing a victim of a Hobbs Act conspiracy, assault or extortion worked at a business engaged in interstate commerce is not enough to meet the de minimis showing required to support federal jurisdiction. *Id.*, at 40. Moreover, here, SECSYS was not even akin to the mortgage banking firm in *Perrota*- SECSYS was simply Everage. The Tenth Circuit's decision below conflicts with the Second Circuit's decision in this regard.

Furthermore, the "business" of SECSYS if the SLOM had actually materialized, would have been oversight of activities- not the actual lending of

securities. A securities lending agent would have been hired to lend securities. The SLOM was going to work for the New Mexico State Treasurer's Office as a contractor and would have oversight, monitoring and reporting responsibilities over the activity of the securities lending agents, by analyzing documents which would be maintained by the New Mexico State Treasurer's Office. The SLOM was an independent contractor for the NMSTO in a potential securities lending program which had yet to be finalized. The government also failed to show that the *oversight* of the securities function necessarily affects interstate commerce. Like in *Mattson*, the depletion of Everage's personal assets in favor of Samantha Sais, would have no affect on the interstate economy. "To so hold would mean that the extortion of money from any individual in our society could arguably affect interstate commerce eventually. Simply stated, the extortion did not affect Playboy, nor interstate commerce through Playboy, but Anderson." *Mattson*, 671 F.2d at 1025. For all these reasons, this Court should respectfully grant the instant petition and reverse the decision below.

B. Mr. Vigil's acts were not wrongful

Count 24 of the Fifth Superseding Indictment Charged:

> Between May 2, 2005 and September 15, 2005, both dates being approximate and inclusive, in the State and District of New Mexico, the defendant Robert Vigil, did knowingly and unlawfully affect and attempt to affect interstate commerce and the movement of

> articles and commodities in interstate commerce by extortion, in that the defendant Robert Vigil attempted to cause George Everage to provide money and property to another person, with Everage's consent, induced by wrongful use and threat to use economic harm and under color or official right, in connection with Everage's efforts to work as the Securities Lending Oversight Manager for the New Mexico State Treasurer's Office.

Under Count 24 of the Fifth Superseding Indictment and Tenth Circuit case law, the government had to prove three essential elements to sustain a conviction under the Hobbs Act:

> *First*: the Defendant wrongfully obtained property from another with that person's consent;
>
> *Second*: the Defendant did so under color of official right or by use of actual or threatened force, violence or fear; and
>
> *Third*: the Defendant's conduct affected interstate commerce.

See 10th Cir. Pattern Instruction 2.71.

Mr. Vigil's conduct underlying Count 24 was not "wrongful" as required by the Hobbs Act. Wrongful has been defined as contrary to law. *See, e.g., Scheidler v. National Organization for Women, Inc.*, 547 U.S. 9, 25

(2006) (legislative history defining wrongful as in violation of the criminal laws). The Tenth Circuit defined the meaning of "wrongful" as: "[W]rongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States v. Vigil*, 523 F.3d 1258, 1263 (10th Cir. 2008) (*quoting*, *United States v. Enmons*, 410 U.S. 396, 400, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973).

The government asserted at trial that Mr. Vigil's conduct was "wrongful" because he had no lawful claim to the "money" that he allegedly demanded Everage to pay to Samantha Sais as part of the Securities Lending Oversight Manager (SLOM) contract negotiation. The government maintained that it was wrongful for Mr. Vigil to stipulate during contract negotiations that Everage had to include Samantha Sais in his contract proposal and had to agree to financial terms with her, to obtain the contract.

The chief problem with these theories is that the New Mexico State Treasurer, like any state agency chief, has every lawful right to create and administer contracts and to require stipulations on those contracts. This is true even if the prospective contracting party disagrees with the stipulations. Disagreements and hard bargaining during contracting are not wrongful. Hard bargaining in contract negotiations happens in government and the private sector on a daily basis. The remedy for the prospective contracting party if he or she disagrees with the terms is to refuse to bid, negotiate, or simply walk away if terms cannot be

reached. At the very most, the actions of the State Treasurer's Office as detailed in the facts supra amounted to "hard bargaining" over the terms of the SLOM, which is not a crime under the Hobbs Act. This is illustrated in *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007).

In *Wilkie*, this Court reversed a decision from the Tenth Circuit interpreting the Hobbs Act (reversing *Robbins v. Wilkie*, 433 F.3d 755 (10th Cir. 2006)).[4] The Bureau of Land Management (BLM) had failed to record an easement across a ranch in Wyoming, so when Robbins bought the ranch and recorded the deed, BLM lost its easement. When Robbins refused to grant the easement again without negotiations, the BLM responded that the federal government does not negotiate. That agency then embarked upon a bitter campaign of harassment to attempt to force Robbins to grant the easement. After many months of abuse Robbins filed a federal RICO lawsuit alleging that the BLM and its agents had engaged in a pattern of extortionate conduct designed to obtain an easement over Robbins' property. He also included a Bivens claim in his complaint.

The Tenth Circuit ruled on interlocutory appeal that Robbins' suit could go forward. The Circuit Court found that the BLM had refused "to maintain the road providing access to Robbins property, cancel[ed] Robbins' special recreation use permit and grazing privileges, [brought] unfounded criminal charges

4. Within the 10th Circuit's opinion, Judge Kelly failed to address or even mention *Wilkie v. Robbins*, 127 S. Ct. 255 (2007), a case from the 10th Circuit which Mr. Vigil analyzed in his opening brief and reply brief.

against Robbins, trespass[ed] on Robbins' private property, and interfere[ed] with Robbins' guest cattle drives." *Robbins*, 433 F.3d at 768. Accordingly, the Tenth Circuit held that these actions could be actionable under RICO as Hobbs Act extortion.

On writ of certiorari, this Court reversed in a 7-2 decision authored by Justice Souter. This Court held that the BLM's actions did not rise to Hobbs Act extortion but instead constituted lawful "hard bargaining." This Court explained that the BLM's actions were merely "hard bargaining intended to induce the plaintiff to come to legitimate terms." 127 S. Ct. at 2602 ; *see also e.g., Brokerage Concepts Inc. v. U.S. Healthcare Inc.*, 140 F.3d 494, 523-24 (1st Cir. 1998) ("What the Act reaches is not mere hard bargaining but the exploitation of the fear of economic loss in order to obtain property to which the exploiter is not entitled."); Judge Browning Op. January 12, 2007, at 31, Appendix .

Here, the government's "victim," George Everage, originally proposed the idea of creating a securities lending program through the New Mexico State Treasurer's Office. He pitched the idea of a SLOM to Mr. Vigil and voluntarily quit his job with the State Treasurer's Office to pursue the SLOM contract. As negotiations progressed, the State Treasurer's Office required as part of the SLOM request for proposal (RFP) that someone perform a computer monitoring and reporting component of the contract. Samantha Sais had the qualifications to satisfy this portion of the contract and Mr. Vigil requested that Everage include her. Everage had to include the computer-monitoring

component within his proposal to properly respond to the SLOM RFP.

Even though Everage proposed the idea of a SLOM, Mr. Vigil as State Treasurer had the ultimate authority to decide whether to implement the SLOM as part of any securities lending program to be created. Mr. Vigil, as Treasurer also had the absolute prerogative to hire or fire George Everage or Samantha Sais. Within the ultimate authority to create this program, Mr. Vigil and the Treasurer's Office necessarily had the more limited authority to place stipulations on the SLOM contract. The stipulations could and did include that Everage employ someone with computer skills that the Treasurer deemed necessary. Mr. Montoya testified at some length regarding Samantha Sais' qualifications and her computer skills which would complement Mr. Everage's performance of the SLOM contract.

None of Mr. Vigil's actions as State Treasurer in proposing creation of a securities lending program and negotiating for a SLOM contract with Everage were "wrongful". Taking the government's theory to its logical conclusion, a state agency chief could never propose, as part of a prospective professional services contract, that an individual include someone else in the contract with complementary skills, for fear of violating the Hobbs Act for "extorting" that individual to pay money to someone else. This makes little sense and is contrary to standard practices in government contracting.

Like in *Wilkie*, Mr. Vigil's actions at most constituted "hard bargaining" to attempt to have Mr.

Everage include Samantha Sais within the SLOM. Mr. Vigil did not employ "inherently wrongful means, such as force or threats of force or criminal prosecution." *See Gillmor v. Thomas*, 490 F.3d 791 (10th Cir. 2007) (finding no extortion by county officials enforcing ordinances). Indeed, Mr. Vigil's conduct was far less coercive than the conduct of the BLM officials in *Wilkie*.

Nonetheless, the Tenth Circuit found that the jury was free to conclude that Vigil's "conduct was 'not mere hard bargaining but the exploitation of the fear of economic loss in order to obtain property in which the exploiter is not entitled.'" *US v. Vigil*, 523 F.3d 1258, 1263 (10th Cir. 2008) (*quoting, Brokerage Concepts, Inc., v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523-24 (3rd Cir. 1998). The fatal flaw in this argument is that neither Everage nor Vigil nor Sais nor anyone had the right to any commissions under a prospective SLOM contract. The Tenth Circuit opinion necessarily assumed that Everage was entitled to 100% of any SLOM commissions, (l) before the SLOM contract had been finalized and fully negotiated, (2) before any securities lending agent (SLA) contracts were finalized with commissions authorized for a SLOM, and (3) before any trades took place. Yet, the SLOM contract would provide Everage only with a pre-qualified position to have an opportunity for employment if: (1) the State Treasurer's Office implemented a Securities Lending Program with SLAs, (2) the STO made a decision to contract the oversight instead of using in-house staff, (3) if the STO used the SLOM (Everage) then terms and agreements were worked out with Securities Lending Agents for securities lending, (4) the NM STO then approved the SLA contract and (5) the State Department of Finance

approved the arrangement. The SLOM contract did not guarantee Everage the right to conduct securities lending for the State or to profit therefrom. Basically, the SLOM was a set of terms and conditions which would be the starting point in negotiations between the STO and SLAs when and if the STO actually decided to move forward with a securities lending program.

The government's theory at trial was that Vigil committed a crime when Sais was proposed as part of the contract, with her potentially receiving commissions, as opposed to the commissions going to the State. This theory is nonsensical. The NMSTO and Vigil had every right to bargain for the terms and conditions of a professional services SLOM contract, including requiring that the contract be divided between two persons with complementary skills. There is nothing criminal or wrongful about that. It cannot be a crime for a state agency to allow two persons to share a professional services contract and any attendant potential commissions, as opposed to having one person perform the contract with some of the commissions going back to the State.

Whether a crime was committed under the Hobbs Act cannot turn on who Mr. Vigil proposed for the SLOM, i.e., Samantha Sais, the wife of Michael Montoya. Even if Mr. Vigil had political motivations for including Sais in the SLOM contract, that would not convert Mr. Vigil's actions into criminal, "wrongful" conduct under the Hobbs Act. *Cf. United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007) (state procurement official who got a raise after steering a state contract to a political favorite was not guilty of federal mail fraud and bribery statutes,

18 U.S.C. §§ 1341 and 666) ("The idea that it was a federal crime for any office in state or local government to take account of political considerations when deciding how to spend public money is preposterous.").

In reality, the only reason that the transaction had even an appearance of impropriety was because Sais' husband Montoya admitted to illegal kickback activities. If Montoya had simply been a political friend, and Vigil had attempted to land his wife a job at a government agency, no one would seriously argue that the Hobbs Act had been violated. Politicians' attempts to obtain jobs for political allies date to the founding of our country. Simply put, nothing Mr. Vigil did as part of the SLOM negotiation process was "wrongful" as that term is defined in the Hobbs Act.

Mr. Vigil's alleged acts did not affect interstate commerce, nor were they wrongful under the Hobbs Act. Therefore, the Tenth Circuit's affirmation of the district court is in conflict with the rulings of this Honorable Court, and the instant Petition should be granted so that this Court can resolve those conflicts.

REASONS FOR GRANTING THE PETITION

I. Review is necessary because the rule below applies the jurisdictional requirement of the Hobbs Act regarding interstate commerce clause too broadly, sweeping in local acts of individuals and blurring the lines between State and Federal Government.

With respect to the first issue, this Court should grant certiorari for three reasons: First, to rectify the circuit court's overly broad interpretation of the jurisdictional requirement under the Hobbs Act; second, to set clear precedent, bringing the standard for the test back to the original intent of the framers when drafting the commerce clause; and finally, to ensure that the overarching principles of federalism are maintained.

This Court has recognized three categories of legislation authorized by the Commerce Clause: (1) statutes regulating "the use of the channels of interstate commerce;" (2) laws governing "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and (3) statutes regulating activities "that substantially affect interstate commerce." *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (U.S. 1995); *see also Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 276-77 (1981); *Perez v. United States*, 402 U.S. 146, 150 (1971). Further, this Court underscored that regulations falling in the third category must bear a "substantial" relationship to interstate commerce. *See Lopez*, 115 S. Ct. at 1630. Approved activities should

have "a close and substantial relation to interstate commerce" or enjoy a "close and intimate relation" to that commerce. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (contrasting those activities with conduct that has only "indirect and remote" effects on interstate commerce). In *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), the Court broadly construed congressional power, holding that Congress was within its power to prohibit racial discrimination by motels serving travelers, despite how local their operations appeared. However, the Court declared that "the determinative test" under the Commerce Clause is whether "the activity sought to be regulated concerns more States than one and has a real and substantial relation to the national interest." *Id.* at 255. In that case, interstate movement of persons (i.e. travelers) is "commerce" which concerns more than one State. *Id.*

In *Lopez*, respondent's conviction for violating the Gun-Free School Zones Act of 1990 after carrying a concealed handgun and bullets to school was reversed. The Court drew a line, only allowing economic activities to be regulated by the Commerce Clause. The *Lopez* concurrence, authored by Justice Thomas, urged the Court to "temper" Congress's commerce power further in future cases. *See Lopez*, 115 S. Ct. at 1642 (Thomas, J., concurring). Justice Thomas even suggested that he "might be willing to return to the original understanding" of the Commerce Clause as a narrow grant of congressional power. *Id.* at 1650.

The Hobbs Act prohibits extortion and robbery that "in any way or degree . . . affects commerce." 18 U.S.C. § 1951(a) (1994). In 1956, this Court upheld Congress's

power to enact this statute. *See United States v. Green*, 350 U.S. 415 (1956). Hobbs Act prosecutions have since been upheld whenever the defendant threatens a business making purchases or sales across state lines because the potential interference with that trade is sufficient to demonstrate an effect on interstate commerce. *See, e.g., Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Davis*, 30 F.3d 613 (5th Cir. 1994); *United States v. Zeigler*, 19 F.3d 486 (10th Cir. 1994); *United States v. Scaife*, 749 F.2d 338 (6th Cir. 1984). However, Hobbs Act prosecutions should not be upheld whenever the defendant allegedly threatens an individual. The Fifth Circuit refused to apply the Hobbs Act to the robbery of a homeowner under an "employee work disruption" rationale. *United States v. Collins*, 40 F.3d 95, 99 (5th Cir. 1994). The argument under this rationale is that the theft of the individual would disrupt his performance at work, and that this disruption would affect the company's production in interstate commerce. *Id.*

The Fifth Circuit correctly found that this "employee work disruption" rationale, as applied to the theft of an individual's private belongings would render the Hobbs Act "ubiquitous, and any robbery . . . arguably would affect interstate commerce." *Id.* at 100. Like the Supreme Court in *Lopez*, the Fifth Circuit drew a line and was not willing to stand for this type of unlimited application. The line was drawn between thefts directly affecting a business engaged in interstate commerce and those affecting individuals employed by those businesses. *See Collins*, 40 F.3d at 99-100. The Fifth Circuit's reasoning for a narrow interpretation of the Hobbs Act is persuasive. The court acknowledged that

"the Hobbs Act definition of commerce is coextensive with the constitutional definition", and suggested that Congress could not constitutionally punish the theft of these private belongings. *Id.* at 100 (*quoting United States v. Hanigan*, 681 F.2d 1127, 1130 (9th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983)). The court also suggested that it would not construe the Hobbs Act this broadly without a clear signal from Congress that the statute " 'significantly changed the federal-state balance.' " *Id.* at 101 (*quoting United States v. Bass*, 404 U.S. 336, 349 (1971)).

The Second Circuit also reversed a conviction under the Hobbs Act holding that merely showing employment with a company that does business in interstate commerce, without more, stretches the Hobbs Act too far. The Court explained that under such a theory, the extortion or assault of anyone who worked in any capacity at any company that participates in interstate commerce would suffice for federal jurisdiction, blurring the boundaries between state and federal jurisdiction. *United States v. Perrotta*, 313 F.3d 33, 38 (2d Cir. 2002).

Even before *Lopez*, the federal courts sometimes dismissed convictions on the ground that the Government had failed to prove an effect on interstate commerce under the Hobbs Act. *See, e.g., United States v. Buffey*, 899 F.2d 1402 (4th Cir. 1990) (finding that attempted extortion did not sufficiently affect interstate commerce because victim would have used personal assets to respond to blackmail); *United States v. Mattson*, 671 F.2d 1020 (7th Cir. 1982) (finding that the depletion of the personal assets of an employee was not sufficient to show effect on interstate commerce). Here

however, the lower court essentially held that the potential depletion of an individual's funds, who never even indirectly affected interstate commerce, met the standard of affecting commerce because of the possibility that his alter ego business that had never dealt in interstate commerce may affect commerce in the future. This ruling stretches the commerce clause too far. Without some judicial enforcement of the Commerce Clause, the principles of federalism embodied in that clause disappear. *See, Symposium: Reflections on United States v. Lopez: Commerce!!*, Deborah Jones Merritt, 94 Mich. L. Rev. 674, 707 (1995). This is the reason the *Lopez* majority correctly determined that the Court must retain some judicial oversight over the reach of the Commerce Clause. This is also why the 5th Circuit correctly drew the line at depletion of individual assets.

The lack of a clear-cut boundary to the limits of the Commerce Clause undermines the underlying principles of federalism and the lines separating state and federal government. Powers not delegated to the federal government are reserved to the States. *See* U.S. Const. Amend. X. A broad interpretation of what affects commerce, and thus what can be governed by the federal government, unconstitutionally expands federal power and necessarily diminishes state power. The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce "among the several States" and the internal concerns of a State. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system. *NLRB v. Jones &*

Laughlin Steel Corp., 301 U.S. 1, 30 (U.S. 1937) (*quoting Schechter Corp. v. United States*, 295 U.S. 495, 549, 550, 554). The Lopez majority stressed that criminal law, like education, is a matter traditionally left to the states. *See United States v. Lopez*, 115 S. Ct. 1624, 1631 n.3 (1995); *see also id.* at 1632 ("Areas such as criminal law enforcement or education [are ones] where States historically have been sovereign."). Since 1980, the annual number of federal criminal cases has expanded by more than fifty percent. Criminal cases now account for almost one-half of all federal trials, and, in some districts, criminal trials swamp civil ones. The federal courts of Southern California, for example, heard six criminal trials for every civil one during 1991. *Symposium: Reflections on United States v. Lopez: Commerce!*, Deborah Jones Merritt, 94 Mich. L. Rev. 674, 707 (1995). Allowing a broad interpretation of the commerce clause blurs the lines separating the State and Federal government and broadens federal jurisdiction to its breaking point. Review is needed to resolve the Tenth Circuit's broad sweeping grant of federal jurisdiction, and to resolve the discrepancy this decision creates with the Fifth and Second Circuits. For all these reasons, the Court should grant certiorari.

II. The decision below ignores and contravenes current Supreme Court precedent ruling that hard bargaining is not wrongful under the Hobbs Act.

The court of appeals has decided an important question of federal law in a way that conflicts with a relevant decision of this Court. This Court ruled in *Wilkie* that hard bargaining was not wrongful. *Wilkie v. Robbins*, 127 S. Ct. 2588 (2007). Mr. Vigil's acts were nothing more than hard bargaining. The Tenth Circuit reached its decision

that Mr. Vigil's acts were wrongful without even mentioning *Wilkie*. There, the agency refused "to maintain the road providing access to Robbins property, cancel[ed] Robbins' special recreation use permit and grazing privileges, [brought] unfounded criminal charges against Robbins, trespass[ed] on Robbins' private property, and interfere[ed] with Robbins' guest cattle drives." to attempt to force Robbins to grant an easement. *Robbins*, 433 F.3d at 768. After many months of abuse Robbins filed a federal RICO lawsuit alleging that the BLM and its agents had engaged in a pattern of extortionate conduct designed to obtain an easement over Robbins' property. This Court held that the BLM's actions did not rise to Hobbs Act extortion but instead constituted lawful "hard bargaining." This Court explained that the BLM's actions were merely "hard bargaining intended to induce the plaintiff to come to legitimate terms." 127 S. Ct. at 2602.

Applying *Wilkie*, Mr. Vigil's alleged threats to Everage to either hire Mrs. Sais or lose the bid for the contract constitutes hard bargaining intended to induce Everage to come to legitimate terms. Respectfully, this court should grant certiorari to remind the Tenth Circuit of the legal precedent this Court set forth in *Wilkie* that the circuit is not following.

In sum, granting certiorari in this case gives this Court an important opportunity to clarify the law regarding the reach and breadth of the Interstate Commerce Clause in the context of the Hobbs Act. It also gives this Court the opportunity to further clarify the meaning of "wrongful" in the Hobbs Act in accord with this Court's *Wilkie* decision.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED APRIL 29, 2008

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 07-2060

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ROBERT VIGIL,

Defendant - Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. No. 05-CR-2051-JB)

Before **KELLY**, **ANDERSON**, and **MURPHY**, Circuit Judges.

KELLY, Circuit Judge.

Defendant-Appellant Robert Vigil was convicted by a jury of attempted extortion in violation of 18 U.S.C. § 1951. In post-trial proceedings, the district court denied his motions for judgment of acquittal. *United States v. Vigil*, 506 F.Supp.2d 544 (D.N.M.2007); *United States v. Vigil*, 478 F.Supp.2d 1285 (D.N.M.2007).

He was sentenced to 37 months' imprisonment followed by three years' supervised release. On appeal, Mr. Vigil challenges of the sufficiency of the evidence supporting his conviction. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

Mr. Vigil was the New Mexico State Treasurer from January 2003 to October 2005. George Everage was an employee of the New Mexico State Treasurer's Office ("STO") who proposed to Mr. Vigil a method of raising more income for the office through a securities lending program. Mr. Everage left the STO to bid for a contract to oversee this program as the Securities Lending Oversight Manager ("SLOM"). Mr. Everage created a business entity SECSYS, LLC which submitted a proposal to the STO to act as the SLOM forecasting that based on the banks' proposals as securities lending agents, the income that SECSYS, LLC would receive was $105,450 in gross proceeds. Before Mr. Everage left the STO, Mr. Vigil told him that he had a friend whose wife needed a job and asked him if he would hire her if he received the contract. Mr. Vigil told Mr. Everage that he would have to pay her $500 to $1,000 per month, and that by hiring her he would be helping Mr. Vigil out. Ann Marie Gallegos, Mr. Vigil's Assistant Treasurer, asked Mr. Everage repeatedly if he had met with Samantha Sais to come to an agreement with her. Mr. Everage did not see the need for an employee, but he agreed to meet with Ms. Sais, the wife of Mr. Vigil's friend, thinking she might be a courier and do some clerical work.

Appendix A

On April 29, 2005, Mr. Everage met with Ms. Sais who said that she expected $55,000 per year in compensation which surprised him: "I almost fell out of my chair. It went from $500 to $1,000 a month to $16,000 a year to $55,000 a year." Aplt.App. at 92. Mr. Everage determined during the meeting that Ms. Sais's "knowledge of securities lending was nonexistent," and that hiring her would compromise his business plan. Ms. Sais explained that Mr. Vigil owed her husband, Michael Montoya, for past favors, Mr. Vigil had not been forthcoming, and Mr. Montoya was considering running against Mr. Vigil in the next election.

Following the meeting on May 2, 2005, Mr. Everage called Mr. Vigil who explained that he needed Mr. Everage to hire Ms. Sais as a favor and if he did not, "this deal was not going to go forward, it was going to die." *Id.* at 98. According to Mr. Everage, Mr. Vigil said that Ms. Sais's skill set was needed in the STO, prompting Mr. Everage to wonder why the STO didn't hire her. Mr. Vigil indicated that the main reason he wanted Mr. Everage to hire her was "to get her off his ass." *Id.* at 98-99. Previously, Tomasita Gallegos, an STO employee, determined that since most of the information would flow automatically and electronically into the STO's accounting system, it would not take her much time to perform the necessary computer work needed by a SLOM.

Initially, Mr. Everage submitted his proposal to the STO without Ms. Sais. He testified that he did so in part because "it would have put me in a position where I had

to subordinate my interests to hers." *Id.* at 100. Ms. Gallegos called Mr. Everage on behalf of the STO and told him that he would have to resolve things with Ms. Sais and submit her resume with his proposal. Although Mr. Everage believed he would violate the request for proposals ("RFP") by including Ms. Sais as a subcontractor, he submitted her name as a potential subcontractor because he believed he would not get anywhere unless he made an accommodation to Ms. Sais.

By the end of May 2005, the STO sent Mr. Everage the SLOM contract, requesting he sign it, and after he signed and returned the contract, the STO sent him three proposals from securities lending agents for his evaluation. Mr. Everage reviewed the responses and prepared a report evaluating them. On June 10, 2005, Mr. Everage met with Ms. Sais a second time, because of pressure from the STO, and proposed that she receive 40% of his *net* income. Ms. Sais responded that she wanted 40% of his gross income because Mr. Vigil owed her husband. During the meeting, it became clear to Mr. Everage that Ms. Sais did not want to work for the compensation. Three days later, Mr. Vigil spoke with Mr. Everage by telephone telling him that he offered Ms. Sais 40% of net. Mr. Vigil responded, "No, no just deal with this [Mr. Everage], we can't, we can't deal with net, it can't work." *Id.* at 151. Mr. Vigil said that Ms. Gallegos was "writing letters I guess to cancel this thing, that's why I called you ... we're not gonna do this if we don't have uh . . . a way of doing it." *Id.* at 154-55. Then Mr. Vigil told Mr. Everage to call Ms. Gallegos to "fix it, otherwise, . . . you're gonna put me through two more

weeks of this crap." *Id.* at 156. Mr. Vigil told him that 10% of something was better than 10% of nothing, suggesting that is what he would get if he did not hire Sais.

Following this conversation, Mr. Everage sent a letter to the STO explaining his position. The STO responded that there was no binding contract because Ms. Sais was critical to the contract and that if Mr. Everage did not respond in two weeks with a satisfactory arrangement with Ms. Sais it would reissue the RFP hoping for more satisfactory responses. In another letter, the STO terminated any contract with Mr. Everage. The STO subsequently offered the SLOM contract to an individual who admittedly knew nothing about securities lending but who agreed to hire Ms. Sais as a condition of receiving the SLOM contract.

On appeal, Mr. Vigil raises six issues: (1) whether his conduct was "wrongful" and not merely hard bargaining or political patronage; (2) whether he "obtained property" from Mr. Everage; (3) whether he used actual or threatened force, violence, or fear; (4) whether the government met the quid pro quo requirement showing that he obtained property "under color of official right;" (5) whether his conduct affected interstate commerce; and (6) whether he took a substantial step toward the commission of extortion.

Appendix A

Discussion

We review the sufficiency of the evidence to support a jury's verdict and the denial of Mr. Vigil's motion for judgment of acquittal de novo. *United States v. Burkley*, 513 F.3d 1183, 1188, 1190 (10th Cir.2008). We ask whether a reasonable jury could find a defendant guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government and drawing reasonable inferences therefrom. *See id.* at 1188.

The Hobbs Act makes unlawful conduct that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). The Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

A. *Wrongful Conduct*

First, Mr. Vigil argues that his conduct was not wrongful as defined by the Hobbs Act but merely hard bargaining or political patronage. The Supreme Court defined the meaning of "wrongful" as used in the Hobbs Act: " '[W]rongful' has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *United States v. Enmons*, 410 U.S. 396,

400, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973). Mr. Vigil argues that his conduct was simply hard bargaining and that he was within his rights to require that someone else perform the computer monitoring and reporting. Mr. Vigil is correct that hard bargaining is not wrongful under the Hobbs Act, but his characterization of the facts is far too narrow given our standard of review.

Mr. Vigil demanded that Mr. Everage hire a specific individual, Ms. Sais, to fill the role despite Mr. Everage's conclusion that Ms. Sais's skills were not needed. Mr. Vigil insisted that Mr. Everage pay her the salary she demanded, 40% of his gross income from the contract, leading Mr. Everage to believe it was a condition to receiving the contract. A rational jury could certainly conclude that Mr. Vigil's conduct was "not mere hard bargaining but the exploitation of the fear of economic loss in order to obtain property to which the exploiter is not entitled." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 523-24 (3d Cir.1998). Mr. Vigil was entitled to evaluate proposals for adequacy on behalf of the state,[1] but he was not entitled to direct the disposition of the income from the contract or specify who was to be hired to perform it. *See United States v. Gotti*, 459 F.3d 296, 327 (2d Cir.2006) (recognizing the intangible property rights to make business decisions free of outside pressure and to decide with whom to work). The district court was entirely correct that the

1. Mr. Everage testified that the securities lending transactions would flow from the custodial bank into the STO's accounting system, exceptions were rare and that Ms. Sais's skills were not needed.

jury was free to reject Mr. Vigil's "hard bargaining" theory and conclude that Mr. Vigil was not concerned with negotiating a lower fee to benefit the state but to shift a portion of the income the contract would generate to Ms. Sais. *See Vigil*, 478 F.Supp.2d at 1306.

Mr. Vigil also argues that Mr. Everage was not entitled to any commissions because many steps needed completing before any commissions would be generated such as selecting securities lending agents on agreeable terms and regulatory approval. This argument ignores the fact that Mr. Vigil was charged with attempted extortion, so the government must only prove a substantial step towards commission of the crime and not the completed offense. In addition, the evidence shows that Mr. Vigil expected Mr. Everage to earn income from the contract and that Mr. Everage would pay Ms. Sais a portion of that income—so even though the contract was not fully executed, all the parties involved acted on the assumption that the contract would generate income.

Finally, Mr. Vigil argues that even if he had political motivations to provide income to Ms. Sais under the contract, political considerations do not make his actions extortionate. Mr. Vigil relies on *United States v. Thompson*, where a state procurement official was acquitted of mail fraud and bribery when she violated administrative rules in steering a travel contract to a low bidder (and campaign contributor to the governor) even though other members of the working group rated a rival company more favorably. 484 F.3d 877, 878-79 (7th

Cir.2007). *Thompson* reasoned that it is "preposterous" that state or local officials violate federal law when they take account of political considerations in spending public money. *Id.* at 883. Ms. Thompson was acquitted because the court concluded that she had not misused her office for private gain when the only evidence of gain was a later raise of $1,000, approved through above-board channels. *See id.* This case is distinguishable because the government offered evidence that Mr. Vigil misused his office for private gain. Mr. Vigil was not merely taking account of political considerations in awarding a contract, but conditioning the award of the contract on the hiring of a specified individual at the price she named to payoff a personal political debt.

B. *Obtaining Money or Property*

Mr. Vigil contends that Mr. Everage did not have any money to be obtained and that the government's intangible property theory varies from the indictment. According to Mr. Vigil, Mr. Everage did not have any money or property to obtain because no enforceable contract existed. Mr. Vigil contends that Mr. Everage's business plan was nothing more than speculative potential.

Property under the Hobbs Act may be tangible or intangible property, *see Gotti*, 459 F.3d at 320-21, and we have no difficulty concluding that Mr. Vigil attempted to obtain both tangible and intangible property from Mr. Everage. First, Mr. Vigil attempted to obtain money from Mr. Everage and direct that money

to Ms. Sais. *See United States v. Green*, 350 U.S. 415, 420, 76 S.Ct. 522, 100 L.Ed. 494 (1956) (extortion may be proven where payments are made to a third party). We reject the argument that the income was too speculative because abundant evidence supports the view that all parties involved treated the right to income under the contract as a valuable interest. There was extensive testimony concerning the negotiations between Mr. Vigil, Mr. Everage, and Mr. Sais to quantify the amount of Ms. Sais's "take" against a backdrop of the gross proceeds from the contract under Mr. Everage's business plan.

Second, the Supreme Court has reaffirmed that Hobbs Act cases relying on an intangible rights theory such as *United States v. Tropiano*, 418 F.2d 1069, 1076 (2d Cir.1969) (holding that the intangible right to solicit refuse collection accounts is "property" under the Hobbs Act), are still good law. *See Scheidler v. Nat'l Org. of Women, Inc.*, 537 U.S. 393, 402 n. 6, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003). The Second Circuit recently held that a number of intangible property rights were cognizable under the Hobbs Act, including *inter alia*, the right to contract with a party of one's choosing, the right to make various business decisions free from outside pressure, and the right to decide with whom to work. *See Gotti*, 459 F.3d at 326-27. The government presented evidence that Mr. Vigil attempted to force Mr. Everage to hire Ms. Sais as a condition for receiving the SLOM contract. A reasonable jury could conclude that this evidence demonstrates that Mr. Vigil attempted to obtain Mr. Everage's intangible right to

make business decisions free from outside pressure and to decide with whom to work.

Second, Mr. Vigil argues that the government's intangible rights theory varied from the indictment and constitutes a constructive amendment to the indictment. After reviewing Mr. Vigil's post-trial pleadings before the district court, it does not appear that Mr. Vigil raised a constructive amendment argument below. Therefore, our review is for plain error. *See United States v. Gonzalez Edeza,* 359 F.3d 1246, 1250 (10th Cir.2004). We reverse for plain error only when there is "(1) an error, (2) that is plain, (3) which affects substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Chavez-Calderon,* 494 F.3d 1266, 1268 (10th Cir.2007). However, even if Mr. Vigil had raised the issue before the district court, we conclude that there was no error, plain or otherwise, constituting a constructive amendment or variance from the indictment.

We recognize two types of variances: "[a] constructive amendment, which is reversible per se, occurs when the district court's instructions and the proof offered at trial broaden the indictment," and "[a] simple variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment, and triggers harmless error analysis." *United States v. Sells,* 477 F.3d 1226, 1237 (10th Cir.2007). The indictment alleges that "part of the attempted extortion" was that Mr. Vigil both "required George Everage to hire [Ms. Sais] as a subcontractor . . . as a condition of Everage

doing business with the [STO]" and "required George Everage to pay a substantial portion of the value of the [SLOM] contract to [Ms. Sais], all as a condition of Everage's employment." Aplt.App. at 26. The allegation in the indictment that Mr. Vigil attempted to force Mr. Everage to hire Ms. Sais is sufficiently broad to support an intangible rights theory.

C. *Threat of Economic Harm*

Under the Hobbs Act, extortion may be proved by showing "actual or threatened force, violence, or fear, *or* under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). Mr. Vigil argues that economic fear is only wrongful under the Hobbs Act if the plaintiff had a pre-existing statutory right to be free from the defendant's demand. *See Brokerage Concepts*, 140 F.3d at 523. Mr. Vigil is correct that economic fear arising from hard bargaining is permitted, for example in the union context, where union officials have a claim to the property they receive and achieve legitimate objectives or provide genuine services that the employer seeks. *See Enmons*, 410 U.S. at 400, 93 S.Ct. 1007. However, economic fear is inappropriate to obtain personal payoffs where, for example, union officials exact payments from employers in return for "imposed, unwanted, superfluous and fictitious services of workers." *Id.* (quotations omitted). Applying this rule, Mr. Vigil is entitled to evaluate proposals for adequacy on behalf of the state and even insist on certain capabilities, but he has no right to demand that Mr. Everage hire a specific and unwanted individual at the price she sets. This is

not a legitimate objective or genuine contract term that Mr. Vigil can rightfully demand. Ms. Sais's services were unwanted by Mr. Everage, and evidence at trial suggested that the compensation was intended as a personal payoff to Mr. Vigil's former associate Mr. Montoya rather than to achieve a legitimate objective such as ensuring SECSYS, LLC has sufficient computer monitoring and reporting expertise.

Mr. Vigil's attempt to distinguish *United States v. Collins*, 78 F.3d 1021 (6th Cir.1996), is similarly unavailing. The Sixth Circuit noted that the individuals bidding on the contracts in *Collins* "acted out of fear that without the payments they could lose the opportunity to compete for government contracts on a level playing field, an opportunity to which they were legally entitled ... [and][t]hey paid out of a fear that . . . they would forfeit any potential business opportunity" with the state. *Id.* at 1030. Mr. Vigil contends that the victims in *Collins* were required to make payments to have an opportunity to bid and be considered for government contracts, but that Mr. Everage had every right to bid and be considered for the contract here. The distinction Mr. Vigil identifies is not meaningful. The difference between the two cases is that the payments to Ms. Sais were to be made going forward out of the proceeds generated under the contract, but the agreement to make those payments was still necessary to close the deal. Mr. Vigil's actions were not merely hard bargaining just because his threats of economic harm occurred at a later stage in the negotiating process than those in *Collins*.

D. *Official Color of Right*

To prove extortion "under color of official right," 18 U.S.C. § 1951(b)(2), "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts," *Evans v. United States*, 504 U.S. 255, 268, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992). Defendant contends that this "quid pro quo" element was not met because there was insufficient evidence that the award of the contract was conditioned on including Ms. Sais. However, the evidence was sufficient that a jury could reasonably believe that the only way that Mr. Vigil would award Mr. Everage the contract was if he agreed to hire Ms. Sais and pay her the compensation she demanded.

E. *Interstate Commerce*

Mr. Vigil argues that his actions did not affect interstate commerce as required for a conviction under the Hobbs Act. *See* 18 U.S.C. § 1951(a). The words of the Hobbs Act suggest that Congress intends to use all of its authority under the commerce clause. *Scheidler*, 537 U.S. at 408, 123 S.Ct. 1057. The government need only demonstrate a de minimis affect on commerce, *United States v. Nguyen*, 155 F.3d 1219, 1224 (10th Cir.1998), and the government may satisfy its burden by showing an actual effect or a potential effect on interstate commerce. *See United States v. Toles*, 297 F.3d 959, 969 (10th Cir.2002).

Mr. Vigil relies on *United States v. Mattson*, 671 F.2d 1020 (7th Cir.1982), arguing that the depletion of an individual employee's assets by robbery or extortion usually does not meet the jurisdictional requirement. That is a correct statement of the law, but Mr. Vigil plainly and negatively affected the operations of a business, SECSYS, LLC, formed by Mr. Everage. For example, the evidence in the light most favorable to the government suggests that the SLOM contract would have resulted in securities transactions between the STO and multi-state lending agents with up to 30% of the fee going to SECSYS, LLC. Mr. Vigil argues that SECSYS, LLC is Mr. Everage's alter ego and should be disregarded for purposes of determining whether interstate commerce was affected. While it is possible to pierce the corporate veil under certain circumstances, Mr. Vigil's bare allegation, without authority or facts in support, is insufficient to do so.

Mr. Vigil also analogizes *United States v. Schaefer*, 501 F.3d 1197, 1200-01 (10th Cir.2007), where we reversed the conviction of an individual's use of the Internet to obtain child pornography because the government presented insufficient evidence to satisfy the interstate commerce element. *Schaefer* is distinguishable for two reasons. First, the court concluded in *Schaefer* that Congress did not intend to exercise its full Commerce Clause power in enforcing the child pornography statute, 18 U.S.C. § 2252. *Id.* at 1202. Second, the government's only evidence regarding interstate commerce was that the defendant used the Internet, and the court declined to assume that "Internet use

automatically equates with a movement across state lines." *Id.* at 1205. *Schaefer* is limited to its facts—the government's say so was not enough to prove that the Internet operates in interstate commerce, no matter how obvious. *Id.* at 1207-08 (Tymkovich, J., concurring).

Moreover, the government presented evidence that the business assets of SECSYS, LLC would have been depleted by 40% of gross revenue had Mr. Everage acceded to Mr. Vigil's demands. *See Nguyen,* 155 F.3d at 1224-25 (holding jurisdiction satisfied where a robbery and murder depleted the assets of a business engaged in interstate commerce). Evidence at trial also showed that the STO sent Mr. Everage proposals from three securities lending agents—Dresdner Bank, Wachovia Bank, and Northern Bank—all multi-state institutions. A rational jury could certainly conclude that Mr. Vigil's acts either actually or potentially affected interstate commerce, notwithstanding that the deal was not closed and securities lent. *See United States v. Foster,* 443 F.3d 978, 983-84 (8th Cir.2006).

F. *Substantial Step*

To prove an attempt crime, the government must prove an (1) intent to commit the substantive offense; and the (2) "commission of an act which constitutes a substantial step towards commission of the substantive offense." *United States v. Smith,* 264 F.3d 1012, 1015 (10th Cir.2001). Mr. Vigil only contests that he did not make a substantial step towards committing extortion. A substantial step must be something more than mere

preparation. *See id.* at 1016. It is "an appreciable fragment of a crime and an action of such substantiality that, unless frustrated, the crime would have occurred." *Id.*

Mr. Vigil argues that the only possible action that could have constituted a substantial step was for Mr. Vigil to order a securities lending deal and then have the deal fall through due to circumstances beyond his control. Mr. Vigil argues that 13 events had to occur before extortion was committed, for example, various state departments would need to approve the contract, the attorney general would need to review the contract and Mr. Vigil would need to have signed it, the securities lending agents would need to bid, be selected, and enter into contracts with the state, and Mr. Everage would need to receive his commission and split it with Ms. Sais.[2]

We do not require that a defendant be "on the verge of committing the specific act," rather, the law "allows criminal liability to attach at some point prior to the last proximate act." *United States v. Prichard*, 781 F.2d 179, 182 (10th Cir.1986). The steps that Mr. Vigil lists are largely ministerial steps, and Mr. Vigil has not pointed to any evidence that these administrative approvals would not be obtained, especially given that Mr. Vigil was in charge of the process and evidence at trial indicated that Mr. Vigil wanted Ms. Sais to receive the compensation.

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2. Many of the events Mr. Vigil lists already had occurred, for example, Mr. Everage signed the contract and made his recommendations for the securities lending agents.

Mr. Vigil relies heavily on *United States v. Joyce*, 693 F.2d 838 (8th Cir.1982), and *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308 (1935), arguing that he abandoned his alleged intention when he refused to give Mr. Everage the contract because Mr. Everage would not hire Ms. Sais. In those cases, the defendants did not complete the crimes because they abandoned their intention to do so, and both courts held that the defendants did not take a substantial step. However, these cases are inapposite because Mr. Vigil did not abandon his intention to complete the deal, Mr. Everage did. When Mr. Everage refused to hire Ms. Sais, Mr. Vigil rescinded the contract or terminated negotiations over the contract with Mr. Everage and offered the contract to another individual conditioned on the hiring of Ms. Sais. A reasonable jury could conclude that the deal would have been completed but for Mr. Everage's refusal to include Ms. Sais in the contract.

Also contrary to Mr. Vigil's contention, Mr. Vigil's acts did "carry the project forward within dangerous proximity to the criminal end," *People v. Bracey*, 41 N.Y.2d 296, 300, 392 N.Y.S.2d 412, 360 N.E.2d 1094 (N.Y.1977). Only Mr. Everage's refusal to give Ms. Sais the compensation she demanded stopped the program from moving forward. This case is similar to another case holding that a defendant took a substantial step towards possessing methamphetamine when he agreed to a time and place for a drug transaction, then changed the location, and arrived at the new location. *United States v. Ramirez*, 348 F.3d 1175, 1180 (10th Cir.2003). The court concluded that the transaction would have

taken place but for the undercover agent's refusal to show up at the new location. *See id.* at 1181.

Mr. Vigil presents no evidence that any other aspect of Mr. Everage's bid, qualifications, or anything else was preventing the deal from being finalized. At best, Mr. Vigil's argument may simply be that his actions occurred in a context too far removed from the completion of the crime to be considered an attempt. However, this argument depends on the view of the evidence, and on sufficiency review, we are required to view the evidence in the light most favorable to the government. *See United States v. Jameson,* 478 F.3d 1204, 1208 (10th Cir.2007). In addition, attempted extortion does not require Mr. Vigil actually obtain property but only that he "attempted to induce his victim to part with property." *Foster,* 443 F.3d at 985 (internal quotations omitted).

Finally, Mr. Vigil's actions constituted a substantial step toward the commission of extortion: for example, the May 2, 2005 phone call where Mr. Vigil told Mr. Everage that he would not get the contract unless he reached an agreement with Ms. Sais; and the June 13, 2005 phone call where Mr. Vigil told Mr. Everage that he could not pay Ms. Sais based on net and that the STO was in the process of cancelling the contract if Mr. Everage could not work out an agreement with Ms. Sais. These actions were not mere preparation but were threats that constituted "an appreciable fragment of [the] crime." *Smith,* 264 F.3d at 1016.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO DATED JANUARY 19, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. CR 05-2051 JB

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT VIGIL,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Defendant's Motion to Set Aside Verdict and for Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 as the Evidence is Insufficient to Sustain a Conviction, filed October 5, 2006 (Doc. 410)("Motion to Acquit"). The Court held a hearing on this motion on December 1, 2006. The primary issue is whether the Court should set aside the jury verdict against Defendant Robert Vigil for attempted extortion under the Hobbs Act, because there is insufficient evidence that he took a substantial step toward the completion of the crime charged. Because the Court concludes that there is sufficient

evidence, taken in the aggregate, that Vigil took a substantial step toward the completion of the crime of extortion, the Court will deny Vigil's motion.

FACTUAL BACKGROUND

Much of the factual evidence pertinent to this motion is not in dispute. Vigil does not seriously dispute that the evidence presented at trial was insufficient for a reasonable jury to find that Vigil intended to extort George Everage or that he took some steps toward extorting Everage. The issue is whether the largely undisputed evidence of those steps constitutes a substantial step toward completion of the crime of extortion.

1. *Evidence of Vigil's Motive to Commit the Crime.*

The United States contends that it presented evidence at trial of several factors that motivated Vigil, while serving as the New Mexico State Treasurer, to transfer funds to Michael Montoya, the former State Treasurer who preceded Vigil. *See* United States' Response to Motion to Set Aside Verdict and For Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 as the Evidence is Insufficient to Sustain a Conviction at 3, filed October 19, 2006 (Doc. 412)("United States' Response"). First, there is evidence that, in 1999, after Vigil was unsuccessful in his bid to run for Governor of New Mexico, Montoya hired Vigil as his Deputy State Treasurer. *See* Transcript of Trial at 158:10-15

(Montoya)(taken September 13, 2006)("Sept. 13 Transcript").[1] There is also evidence that, later, when Vigil ran for the position of Treasurer, Montoya, in combination with Angelo Garcia and Kent Nelson, provided Vigil significant monetary and other support. *See id.* at 242:22-243:12. There was evidence presented that Montoya and Garcia kept a record of these expenditures, that they shared this record with Vigil, and that they indicated to Vigil that they, and Nelson, had mutually contributed to cover these expenses. *See id.* at 258:6-14; *id.* at 263:2-6.

The United States further asserts that it presented evidence that Vigil failed to report these contributions on his campaign finance report forms and knew that Montoya possessed documents through which he could prove Vigil received this money. *See* United States' Response at 4. Montoya testified that he showed these documents to Judy Espinosa, the New Mexico State Treasurer's Office's ("NMSTO") public relations officer, and Espinosa confirmed that she confronted Vigil about what she believed were contributions missing from his campaign finance reports. *See id.* at 285:2-286:24 (Montoya); Transcript of Trial at 49:11-14 (Espinosa) (taken September 19, 2006)("Sept. 19 Transcript").

In addition, there was also evidence presented that Montoya placed pressure on Vigil by threatening to run

1. The Court's citations to the transcript of the trial refer to the Court Reporter's original, unedited version. Any final transcript may contain slightly different page and/or line numbers.

against him in the next election. *See* Sept. 13 Transcript at 283:10-15 (Montoya). The jury heard a recorded conversation in which Vigil said to Garcia that, if the NMSTO was going to contract with Everage for securities lending, the NMSTO needed to ensure that Samatha Sais, Montoya's wife, receive a job as part of the transaction. *See* Transcript of Recorded Conversation at 7 (taken February 23, 2005) (Government's Exhibit 589-T). Vigil's acknowledgment that "[Montoya] is all over there telling everybody he's running for Treasurer" followed that statement. *Id.* Similarly, during a conversation with Nelson on May 2, 2005, Vigil indicated that he felt he could prevent Montoya from running for State Treasurer by securing Sais a job in the securities-lending project. *See* Transcript of Recorded Conversation at 38-39 (taken May 2, 2005)(Government's Exhibit 592-T).

2. ***Evidence that Vigil Previously Directed Funds to Montoya.***

The United States asserts that the jury heard evidence that, during his tenure as State Treasurer, Vigil arranged for Montoya to receive illicit payments. *See* United States' Response at 3. Garcia testified that he issued a check, written out to "Cash" in the amount of $30,000.00, to Montoya in August 2003. *See* Transcript of Trial at 86:18-87:4 (Garcia)(taken September 20, 2006) ("Sept. 20 Transcript"); MAV Investments' Check Payable to Cash (dated August 27, 2003)(Government Exhibit 185 at Bates AG_MAV7205 — 264). Garcia testified that these funds reflected a portion of

commissions that Nelson earned from a number of securities transactions Nelson executed with the NMSTO earlier in 2003. *See* Sept. 20 Transcript at 85:4-9 (Garcia). Garcia testified that Vigil had informed him that the NMSTO was going to execute the transactions with Nelson earlier in August 2003, and told Garcia to "just take care of [Montoya] and get him off my back." *Id.* at 87:11-14.

3. ***Securities Lending.***

Everage testified that, while employed at the NMSTO, he proposed to Vigil that the NMSTO initiate a securities-lending program to earn additional income on the office's securities inventory. *See* Transcript of Direct Testimony of George Everage at 23:7-19 (taken September 15, 2006)("Everage Direct Examination"). Everage indicated that Vigil was initially reluctant because of his awareness that other state agencies had enjoyed varying degrees of success implementing similar programs. *See id.* at 24:24-25:3. In response to Vigil's concerns, Everage suggested that the NMSTO could use multiple securities-lending agents, and bid the project out to the various agents to create competition and to ensure the NMSTO a better yield on its lending activity. *See id.* at 25:17-21. Everage estimated that the NMSTO could earn between one and three million dollars annually through the securities-lending program. *See id.* at 31:19-23. Everage understood, however, that the securities-lending program had the potential to not make money or to make less money than he estimated. *See id.* at 149:10-15; Transcript of Cross-

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Examination and Redirect-Examination of George Everage at 13:21-14:1 (taken September 18, 2006) ("Everage Cross-Redirect").

To institute the securities-lending program, Everage recommended that the NMSTO create a position-securities-lending oversight manager ("SLOM")—to oversee the securities-lending agents and to ensure the agents complied with the NMSTO's investment policy. *See* Everage Direct Examination at 27:15-22. Everage stated that, when he proposed the securities-lending plan to Vigil, he told Vigil that a NMSTO employee could handle the SLOM position's duties "in-house," or the NMSTO could contract with a third-party to act as the SLOM. *Id.* at 32:4-12. Everage represented that Vigil decided to issue a contract for the SLOM position, because the NMSTO did not have the budgetary resources to have an in-house employee perform the job functions. *See id.* at 36:9-14. Everage also understood that the New Mexico Legislature never allocated the NMSTO funds to have the SLOM position funded in-house. *See* Everage Cross-Redirect at 37:12-15. Upon learning that the NMSTO would contract the SLOM position, Everage informed Vigil that, if and when the securities-lending program was implemented, Everage would like the opportunity to bid on the contract for the SLOM position. *See* Everage Direct Examination at 36:22-23.

Everage, in association with several other NMSTO employees—Vigil, Assistant State Treasurer Ann Marie Gallegos, Deputy State Treasurer Elaine Olah, the

NMSTO's counsel, Dave Romero, and the NMSTO's Investment Advisor, Mark Canavan—drafted a request for proposals ("RFP") for the SLOM position. *See id.* at 43:6-16; Notice of Request for Proposals for Securities Lending Oversight Manager (Government's Exhibit 512)("SLOM RFP"). Among the provisions included in the SLOM RFP was a prohibition against subcontracting work the SLOM would perform on behalf of the NMSTO. *See* Everage Direct Examination at 46:8-14; SLOM RFP, Part II.C ¶ 4. The SLOM RFP also indicated that the State Treasurer could terminate any contract between the NMSTO and the SLOM at will. *See* Everage Cross-Redirect at 22:2-4; 22:11-14; SLOM RFP, Professional Service Contract ¶ 5. Finally, the RFP established that the SLOM would be paid a fee calculated as a percentage of the value of securities that the NMSTO lent. *See* Everage Cross-Redirect at 35:17-23; SLOM RFP, Professional Service Contract ¶ 2.

Everage testified that, when he informed Vigil that he was interested in applying for the SLOM position, Vigil indicated that he had a friend whose wife needed a job and inquired if Everage would be willing to hire her should he receive the SLOM contract. *See* Everage Direct Examination at 37:5-12. Everage learned that this woman was Sais. *See id.* at 38:3-9. Everage testified that Vigil told him that Sais "was being a pain in his ass," and that he would appreciate Everage assisting him in "get[ting] her off his ass." *Id.* at 41:13-15. Everage testified that, when he first inquired what he would have to pay Sais, he was told he should expect to pay her between $500.00 and $1,000.00 per month, but that Vigil

continued to place pressure on him and the price eventually escalated to $16,000.00 per year. *See id.* at 37:17-21; 41:16-21.

4. ***SLOM Contract.***

At Vigil's request, Romero performed an evaluation and determined that the NMSTO could legally award the SLOM contract to a former state employee. *See id.* at 49:13-24. On April 15, 2005, Everage left his position at the NMSTO with the intention of seeking the SLOM contract. *See id.* at 43:17-22; 44:1-4.

Everage testified that, subsequent to his leaving the NMSTO, he received a call from Gallegos inquring whether Everage had reached an employment agreement with Sais; Everage responded that, at a minimum, he and Sais should meet face-to-face before coming to any arrangement. *See id.* at 51:2-14. On April 29, 2005, Everage met with Sais in Albuquerque to discuss her professional background and qualifications. *See id.* at 53:8-14. At the April 29, 2005 meeting, Sais informed Everage that she was expecting her compensation to be $55,000.00 per year. *See id.* at 55:12-14. Based on this meeting, Everage concluded that Sais did not have any knowledge regarding securities lending, and decided that he did not wish to hire her. *See id.* at 59:24-60:10. In addition, during their April 29, 2006 conversation, Sais represented to Everage that Vigil owed favors to Montoya and that Montoya was contemplating running against Vigil for State Treasurer in 2006. *See id.* at 60:17-21. Subsequent to his meeting

with Sais, Everage called Vigil to discuss the results of the meeting. *See id.* at 61:3-6. Everage testified that, based on this conversation with Vigil, it was his understanding that, if he did not hire Sais, he would not be considered for the SLOM position. *See id.* at 61:8-9. Everage indicated that this telephone call was not recorded. *See id.* at 63:11-13.

Everage submitted a bid for the SLOM contract on May 3, 2005; his bid did not include any role for Sais as part of his contract performance. *See id.* at 62:12-17. Everage acknowledged that, at the time he submitted his application for the SLOM position, he did not have a vested right in the SLOM contract, and that Vigil had the authority to cancel the NMSTO's request for proposals and/or not to proceed with the securities-lending program. *See id.* at 77:20-78:6.

Everage testified that, subsequent to submitting his bid, he received a call from Gallegos who told him that he needed to come to a resolution with Sais and to include her resume with his proposal. *See id.* at 79:9-15. Everage faxed an addendum to his bid for the SLOM contract to the NMSTO on May 12, 2005. *See id.* at 81:7-8. This addendum characterized Sais as a subcontractor, indicated that Sais would send her resume directly to the NMSTO, and represented that Everage would employ Sais as a subcontractor if the NMSTO specifically approved the use of a subcontractor. *See id.* at 81:20-24. Everage also drafted a Memorandum of Understanding documenting the terms of his agreement with Sais. *See* Everage Cross-Redirect at 26:14-17. The

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Memorandum of Understanding provided for Sais to receive the lesser amount of forty percent of Everage's net earnings from securities lending or $45,000.00 per year. *See id.* at 26:18-24. Everage testified that he and Sais never signed the Memorandum of Understanding and the NMSTO never sent him an amended version of the contract authorizing the use of subcontractors. *See* Everage Direct Examination 130:7-14; Everage Cross-Redirect at 28:10-12.

Everage testified that, at some point between May 12, 2005 and May 30, 2005, someone from the NMSTO called him and told him that the NMSTO would send him the responses to a request for proposals regarding securities lending that the NMSTO had distributed to securities-lending agents. *See* Everage Direct Examination at 85:24-86:2. Everage also stated that he received from the NMSTO a contract for the SLOM position that had changed the conditions of the original proposal he had submitted to the office, and requested that he sign and return the contract. *See id.* at 86:15-18. Everage signed the contract and returned it to the NMSTO, along with a request that Vigil sign a copy of the contract and return it to Everage. *See id.* at 88:4-9. Everage testified that, when he signed the contract and returned it to the NMSTO, he believed that the contract had been consummated. *See id.* at 91:7-14. Everage testified that, accordingly, the NMSTO sent him the bid proposals of three securities-lending agents, and that he reviewed and evaluated these agents' applications for the securities-lending agent position and prepared a report making recommendations to the NMSTO. *See*

id. at 93:17-22; 94:3-5; Government's Exhibit 524. Finally, Everage also indicated that he had been invited to attend a June 16, 2005 meeting that had been scheduled so that the NMSTO's securities-lending evaluation committee could consider the securities-lending agents' applications. *See id.* at 97:17-21.

On June 10, 2005, Everage met with Sais for a second time in an attempt to negotiate a fee-sharing arrangement for fees generated through the SLOM position. *See id.* at 102:7-9. At the conclusion of this meeting, Everage made a final determination that he would not be able to employ Sais. *See id.* at 105:14-18. Following this meeting, on June 13, 2005, Everage spoke to Vigil by telephone. *See id.* at 105:19-23. Everage indicated to Vigil that he had offered Sais forty percent of the SLOM's net proceeds, and Vigil replied: "No, no just deal with this George, we can't, we can't deal with net, it can't work." Transcript of Recorded Conversation at 2 (recorded June 13, 2005) (Government's Exhibit 591-T). Vigil expressed displeasure that Everage was offering Sais a percentage of net, rather than gross, proceeds, and stated that "we're not gonna be able to make this contract if you're over here ... trying to put a crap on it." *Id.* at 3. Vigil also represented that he personally spoke to Sais to determine what amount of compensation she would deem adequate. *See id.* at 4. It was Everage's understanding as a result of this conversation that Vigil was unhappy that Everage and Sais could not reach some arrangement, and Everage felt that Vigil was threatening to cancel his contract with the NMSTO if Everage and Sais could not resolve their

disagreement. *See* Everage Direct Examination at 111:11-12; 112:9-12; Everage Cross-Redirect at 80:4-7.

At Vigil's advice, Everage followed up his conversation with Vigil by calling Gallegos. *See* Everage Direct Examination at 122:8-9. After speaking to Gallegos, Everage considered his prospects of working as the SLOM to be extinguished. *See id.* at 122:14-16. Everage documented his concerns regarding what he perceived as Sais' attempt to extort the NMSTO in a letter to Vigil dated June 13, 2006. *See id.* at 122:24-123:1. In the letter to Vigil, Everage summarized his position: "I would hope that the threat made by you and Ms. Gallegos, that is, if Ms. Sais's demands are not met by [Everage], that the existing SLOM contract will be repudiated and a new RFP issued and by implication that [Everage] will likely not be re-selected as SLOM for securities lending, will not be acted upon." Letter from George Everage to Robert Vigil at 2 (dated June 13, 2005)(Government's Exhibit 521). *See* Everage Direct Examination at 126:7-13.

The NMSTO responded to Everage's June 13, 2005 letter in a letter dated June 23, 2005. *See* Everage Direct Examination at 128:21-129:1; Letter from Ann Marie Gallegos to George Everage (dated June 23, 2005) (Government's Exhibit 528)("Gallegos Letter"). The NMSTO's letter asserted that, at the time of the letter's writing, there was no legal contract in effect between Everage and the NMSTO. *See* Everage Direct Examination at 129:15-17; Gallegos Letter at 1. The letter further indicated that prior communications were

an attempt to negotiate acceptable terms, not actual or implied threats, and that Everage "must surely recognize that in responding to the RFP, and including Ms. Samantha Sais as a proposed subcontractor, that [the NMSTO's] evaluation of [Everage's] proposal would include an evaluation of the knowledge, skills and abilities you [and Sais] both offer." Gallegos Letter at 1. *See* Everage Direct Examination at 129:23-130:2; Everage Cross-Redirect at 66:2-5. The letter concluded:

> In any event, we must conclude negotiations or failing that, reissue the RFP and hope for more satisfactory responses. Should you **fail to respond to this request by 5:00 p.m. July 8, 2005, we will consider your offer withdrawn** and will proceed with the re-issuance of the RFP for a Securities Lending Oversight Manager.

Gallegos Letter at 2 (bold emphasis in original). *See* Everage Direct Examination at 131:10-16. Everage noted that Romero was among the recipients carbon-copied on the letter. *See* Everage Direct Examination at 131:25-132:8.

Everage responded to the NMSTO's letter in a letter dated July 7, 2005. *See* Everage Direct Examination at 132:19-23; Letter from George Everage to Ann Marie Gallegos (dated July 7, 2005) (Government's Exhibit 529)("Everage Response Letter"). In the letter, which Everage's wife, an attorney, assisted in drafting, Everage argued that there was a

legal contract in effect between Everage and the NMSTO and that, in preparing the report evaluating the securities-lending agents that had submitted bids to the NMSTO, Everage had performed pursuant to that contract. *See* Everage Response Letter at 1; Everage Direct Examination at 133:20-134:6. Everage further maintained that his failure to employ Sais could not invalidate the contract because Sais was a subcontractor, the contract expressly prohibited subcontracting, and that the contract had never been amended or reformed to allow subcontracting. *See* Everage Response Letter at 1; Everage Direct Examination at 134:13-20. In a letter dated July 15, 2005, Romero responded to Everage's letter alleging Everage's legal analysis was flawed, and re-asserting that no contract existed between Everage and the NMSTO. *See* Everage Direct Examination at 139:1-9; Letter from Dave Romero to George Everage (dated July 15, 2005)(Government's Exhibit 530).

Everage testified that he did not lose any money as a result of the NMSTO cancelling any SLOM contract he might have had. *See* Everage Cross-Redirect at 16:4-6. Everage did acknowledge, however, that he had indicated to Sais, in a tape-recorded conversation, that he lost $5,000.00 to $6,000.00 per month in projected earnings as a result of the NMSTO rescinding his contract. *See id.* at 17:1-2; 17:11-16. Everage emphasized that these were projected losses; he testified that "[t]here was no money for me to lose. I never had it in my hand." *Id.* at 20:10-11.

5. *The Second RFP.*

On August 9, 2005, the NMSTO issued a revised RFP for the SLOM position. *See* Request for Proposals for Professional Services to Provide Securities Lending Oversight Manager Services to the Office of the New Mexico State Treasurer at 5 (Government's Exhibit 532)("Second SLOM RFP"). The Second SLOM RFP contained a provision that granted the NMSTO the discretion to bifurcate the SLOM position into two components and award separate contracts to: (i) a securities-lending manager; and (ii) an information-technologies ("IT") manager. *See id.*, Part I.C. In an August 24, 2005 meeting with Nelson, Vigil indicated that the NMSTO issued the Second SLOM RFP because Everage did not want to pay Sais enough money, and that the new RFP structure gave the NMSTO more control over the amount each party to the SLOM contract would be paid. *See* Transcript of Recorded Conversation at 70 (recorded August 24, 2005) (Government's Exhibit 598-T). Vigil also told Nelson that he was unconcerned whether Everage submitted a response to the second RFP, because his primary concern "was more ah Samantha, you know, trying to give her a job." *Id.* at 71.

Andrew Perkins, a former contract employee at the NMSTO, testified that Gallegos asked him whether he would be interested in submitting a bid to the second RFP. *See* Transcript of Trial at 33:12-18 (Perkins)(taken September 18, 2006)("Sept. 18 Transcript"). When Perkins indicated that he would be interested, but that

he did not have any knowledge regarding securities lending, Gallegos provided him a textbook on the subject. *See id.* at 34:7-14. Subsequent to this encounter, Perkins submitted a bid in response to the Second SLOM RFP. *See id.* at 38:13-15. Perkins' proposal indicated that he was partnered with Thomas Chepucavage, an individual with a bachelor's degree in information technology and professional experience as an information-technology consultant with Accenture Consulting. *See id.* at 40:2-10. Perkins was aware, however, that two or more contracts could be awarded. *See id.* at 60:2-6.

Several days after receiving Perkins' response to the Second SLOM RFP, Gallegos contacted Perkins and informed him that the NMSTO had awarded the IT portion of the SLOM contract to Sais. *See id.* at 45:10-12. At a subsequent meeting at the NMSTO involving Vigil, Perkins, Sais, and Gallegos, Vigil informed Perkins that thirty percent of the fees generated through securities lending would be allocated to Perkins' firm, and that Sais would receive half of that thirty percent. *See id.* at 49:4-10. Perkins testified that he would have preferred to work with Chepucavage, but did not believe working with Sais was optional. *See id.* at 50:20-51:5.

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PROCEDURAL BACKGROUND

On July 25, 2006, a grand jury returned a Fifth Superceding Indictment charging Vigil with twenty-four counts of racketeering and extortion in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c)-(d), and the Hobbs Act, 18 U.S.C. §§ 1951 & 1952. *See* Fifth Superceding Indictment, filed July 25, 2006 (Doc. 259). The Court held a jury trial in this case from September 5, 2006 to September 30, 2006. On September 28, 2006, at the close of the United States' evidence, Vigil moved, under rule 29 of the Federal Rules of Criminal Procedure, to dismiss all charges. The Court took the motion under advisement, but indicated to the parties that it was inclined to submit all the counts to the jury. *See* Transcript of Trial at 147:2-149:1 (Court)(taken September 28, 2006). Subsequent to the Court reserving its ruling, Vigil chose not to present any evidence. The jury returned a verdict on September 30, 2006 finding Vigil not guilty on Counts One through Twenty-Three and guilty on Count Twenty-Four of the Fifth Superceding Indictment. *See* Verdict, filed September 30, 2006 (Doc. 408).

Count Twenty-Four of the Fifth Superseding Indictment charges:

> Between May 2, 2005 and September 15, 2005, both dates being approximate and inclusive, in the State and District of New Mexico, the defendant Robert Vigil, did knowingly and

> unlawfully affect and attempt to affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, in that the defendant Robert Vigil attempted to cause George Everage to provide money and property to another person, with Everage's consent, induced by wrongful use and threat of use of economic harm and under color of official right, in connection with Everage's efforts to work as the Securities Lending Oversight Manager for the New Mexico State Treasurer's Office.

The Court instructed the jury that "to prove an attempt, the government must prove beyond a reasonable doubt that (1) Mr. Vigil intended to commit the crime; and that (2) Mr. Vigil took a substantial step towards commission of that crime." *See* Court's Final Jury Instructions with Citations, Instruction No. 33, at 73, filed September 28, 2006 (Doc. 394)("Jury Instructions"). The Court explained:

> A "substantial step" is something beyond mere preparation. A substantial step is an act which, in the ordinary and likely course of events, would lead to the commission of the particular crime. The step must be a strong indication of Mr. Vigil's criminal intent, and must unequivocally mark Mr. Vigil's acts as criminal. It should demonstrate commitment to the crime charged.

Id. With the exception of replacing the phrase "the defendant" with "Mr. Vigil," the Court's instruction tracked verbatim the Tenth Circuit's Criminal Pattern Jury Instruction 1.32. *See* Tenth Circuit Criminal Pattern Jury Instruction 1.32, at 52 (2005).

On October 5, 2006, Vigil filed this motion, pursuant to rule 29 of the Federal Rules of Criminal Procedure, arguing that the evidence presented at trial, when considered in the light most favorable to the jury's verdict, was insufficient to sustain a conviction and requesting the Court to enter a judgment of acquittal on Count Twenty-Four of the Fifth Superseding Indictment. *See* Motion to Acquit at 9. Vigil filed a second motion concomitant with this one, asserting that, even when all the evidence presented at trial is considered in the light most favorable to the jury's verdict, the facts of this case related to the NMSTO's attempt to engage in securities lending do not constitute a violation of the Hobbs Act. *See* Motion to Set Aside Verdict and for Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 or in the Alternative for New Trial on Count 24, filed October 5, 2006 (Doc. 411)("Impossibility Motion"). The Court issued a Memorandum Opinion and Order denying Vigil's second motion on January 12, 2007.[2] *See* Memorandum Opinion and Order, filed January 12, 2007 (Doc. 436)("Impossibility Opinion").

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2. The Court notes that Vigil includes one paragraph in his motion arguing that legal impossibility is a recognized defense to an attempt charge. *See* Motion to Acquit at 5-6. Vigil

(Cont'd)

Appendix B

RULE 29

Rule 29(b) of the Federal Rules of Criminal Procedure permits a trial court to reserve decision on a defendant's motion for judgment of acquittal, made at the close of the government's evidence, and to submit the case to the jury. *See* Fed.R.Crim.P. 29(b). If the court submits the case to the jury, and the jury returns a guilty verdict, the defendant may renew his motion within seven days after a guilty verdict. *See* Fed.R.Crim. P. 29(c). The rule provides that, if the trial court decides to reserve its decision, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed.R.Crim.P. 29(b).

STANDARD FOR DECIDING MOTIONS FOR ACQUITTAL

The Supreme Court of the United States has long recognized the government's burden to prove every element of a criminal charge beyond a reasonable doubt as a constitutional imperative. *See In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This requirement, applied though the rules of evidence

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does not make any other reference to legal impossibility in this motion. Because the Court, in its January 12, 2007 Memorandum Opinion and Order, has previously determined that the facts presented at trial, when viewed in the light most favorable to the United States, do constitute a Hobbs Act violation, the Court need not reconsider Vigil's legal impossibility argument at this time.

consistent with that standard, is a "historically grounded right[ ] of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Id.* (quoting *Davis v. United States*, 160 U.S. 469, 488, 16 S.Ct. 353, 40 L.Ed. 499 (1895)).

When reviewing challenges to the sufficiency of evidence underpinning a criminal conviction, courts must evaluate the direct and circumstantial evidence, together with all reasonable inferences that might be drawn from that evidence, in the light most favorable to the government, and determine whether a reasonable jury could find the defendant guilty beyond a reasonable doubt. *See United States v. Isaac-Sigala*, 448 F.3d 1206, 1210 (10th Cir.2006). A court should "not overturn a jury's finding unless no reasonable juror could have reached the disputed verdict." *United States v. Carter*, 130 F.3d 1432, 1439 (10th Cir.1997). The court should let stand the conviction where a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. McPhilomy*, 270 F.3d 1302, 1307 (10th Cir.2001)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

In evaluating a sufficiency-of-the-evidence challenge made after a defendant has presented his case-in-chief, the court is not limited to reviewing the government's case-in-chief alone, but may review the entire record, including evidence that the defendant presents. *See United States v. Delgado-Uribe*, 363 F.3d 1077, 1082

(10th Cir.2004). The court may not, however, weigh conflicting evidence or consider the credibility of witnesses. *See United States v. McKissick*, 204 F.3d 1282, 1289 (10th Cir.2000). It is the jury's responsibility to appraise witness credibility, weigh testimony, draw reasonable inferences, and reach a conclusion as to a defendant's guilt. *See United States v. Cooper*, 375 F.3d 1041, 1044 (10th Cir.2004). The court's duty is to "determine whether the evidence, if believed, would establish each element of the crime." *United States v. Vallo*, 238 F.3d 1242, 1247 (10th Cir.2001)(quoting *United States v. Evans*, 42 F.3d 586, 589 (10th Cir.1994)).

Although the jury's decision is afforded great deference, "the evidence, when viewed in its entirety, must generate more than a mere suspicion of guilt, and where such evidence is equally consistent with both guilt and innocence the conviction cannot be sustained." *United States v. Weidner*, 437 F.3d 1023, 1032 (10th Cir.2006) (quoting *United States v. Fox*, 902 F.2d 1508, 1513-14 (10th Cir.1990)). In reaching a conviction, juries have "wide latitude to determine factual issues and to draw reasonable inferences from circumstantial evidence," but inferences are reasonable only when, "with experience serving as the touchstone[,] . . . there is a reasonable probability that the conclusion flows from the facts in evidence." *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir.2005)(internal citation omitted). Where an inference relates to an ultimate conclusion underpinning criminal liability, "a jury may draw [the] inference only where that inference can be made beyond a reasonable doubt." *Id.* at 1295 n. 4 (quoting *United States v. Rahseparian*, 231 F.3d 1257, 1264 (10th Cir.2000)).

Appendix B

THE HOBBS ACT

The Hobbs Act makes conduct unlawful that "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The essence of a Hobbs Act violation is the wrongful means that a defendant employs to obtain the property in question, *i.e.* "a lawful right to property or lawful authority to obtain property is not a defense to extortion; rather, if [a defendant] obtains property that he has lawful authority to obtain, but does so in a wrongful manner, his conduct constitutes extortion under the Hobbs Act." *Robbins v. Wilkie*, 433 F.3d 755, 769 (10th Cir.2006). When the government charges extortion under color of official right, the court focuses on the nature of the public official's claim to the property in question, because liability attaches only when a public official "obtains a 'payment to which he was not entitled, knowing the payment was made in return for official acts.' " *United States v. Kelley*, 461 F.3d 817, 826 (6th Cir.2006)(quoting *Evans v. United States*, 504 U.S. 255, 268, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992)). On the other hand, government officials acting zealously within their statutory powers do not violate the Hobbs Act merely because the results of their actions are adverse to a

particular entity or business activity. *See Robbins v. Wilkie*, 433 F.3d at 769-70; *Sinclair v. Hawke*, 314 F.3d 934, 943-44 (8th Cir.2003)(noting "regulators do not become racketeers by acting like aggressive regulators").

When the government charges extortion based on the defendant's "wrongful use of actual or threatened force, violence, or fear," the law is well settled that the Hobbs Act proscribes the use of the fear of economic loss. *See United States v. Lotspeich*, 796 F.2d 1268, 1269-71 (10th Cir.1986)(upholding an extortion conviction premised on the use of fear of economic loss); *United States v. Livingston*, 665 F.2d 1003, 1005 (11th Cir.1982)("It is well established that the use of fear of economic loss is proscribed by the extortion statute."); *United States v. Quinn*, 514 F.2d 1250, 1267 (5th Cir.1975)("Fear of economic loss is a type of fear proscribed by part (b)(2) of the Hobbs Act."). Despite this recognition, federal courts have also acknowledged that this fear plays a legitimate role in many economic transactions.

> [F]ear of economic loss plays a role in many business transactions that are entirely legitimate; awareness of that fear and use of it as leverage in bargaining, in which each side offers the other property, services, or rights it legitimately owns or controls, is not made unlawful by the Hobbs Act. What the Act reaches is not mere hard bargaining but the exploitation of the fear of economic loss in

order to obtain property to which the exploiter is not entitled.

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523-24 (3d Cir.1998)(quoting *United States v. Capo*, 791 F.2d 1054, 1062 (2d Cir.1986)(" *Capo I* "), *vacated in part on other grounds*, 817 F.2d 947 (2d Cir.1987)). Finally, "economic loss" under the Hobbs Act is not limited to the loss of tangible property or existing relationships, "but may be no more than the [victim's] right to make his business decisions free of threats and coercion, or other intangible rights." *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir.1986). *See United States v. Kelley*, 461 F.3d at 826 ("Under the 'fear of economic harm' theory, the defendant receives payment from the victim because the victim believes that the defendant can exercise his or her power to the victim's economic detriment."); *Capo I*, 791 F.2d at 1062 (stating that concept of economic loss encompasses a lost opportunity to enter into a business relationship).

EVIDENCE NECESSARY FOR AN ATTEMPT CRIME

For a defendant to be guilty of an attempt crime, the government must prove beyond a reasonable doubt that: (i) the defendant intended to commit the crime; and (ii) the defendant took a substantial step towards commission of that crime. *See United States v. Cornelio-Pena*, 435 F.3d 1279, 1286 (10th Cir.2006). Consequently, neither mere preparation nor an intent to commit a crime is sufficient to sustain an attempt conviction. *See*

Seeley v. Chase, 443 F.3d 1290, 1296 (10th Cir.2006) (recognizing a "dividing line between preparation and attempt"); *United States v. Contreras*, 950 F.2d 232, 238 (5th Cir.1991)(acknowledging "criminal intent alone is not enough to commit an attempt"). Consistent with that understanding, modern federal courts abide by the traditional common-law rule that "the mere intent to violate a federal criminal statute is not punishable as an attempt unless it is also accompanied by significant conduct." *United States v. Resendiz-Ponce*, — U.S. — —, 127 S.Ct. 782, 787, 166 L.Ed.2d 591 (2007).

In evaluating the significance of conduct accompanying criminal intent, the United States Court of Appeals for the Tenth Circuit has noted that "[t]he determination as to whether an action amounts to a substantial step or mere preparation is highly fact specific." *United States v. Bender*, 183 Fed. Appx. 763, 770 (10th Cir.2006).[3] *See United States v. Smith*, 264 F.3d

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3. The Tenth Circuit Rule 36.3(B) previously stated: "Citation to an unpublished decision is disfavored. But an unpublished decision may be cited to if: (i) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (ii) it would assist the court in its disposition." Effective January 1, 2007, the Tenth Circuit has deleted rule 36.3(B) to comply with rule 32.1(a) of the Federal Rules of Appellate Procedure. Rule 32.1(a), which the Supreme Court made effective December 1, 2006, prohibits a court from restricting "the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been[:] (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007." Fed. R.App. P. 32.1(a).

1012, 1016 (10th Cir.2001)("The dividing line between preparation and attempt is not clear and depends to a high degree on the surrounding factual circumstances.") (quoting *United States v. DeSantiago-Flores*, 107 F.3d 1472, 1478-79 (10th Cir.1997), *overruled on other grounds by United States v. Holland*, 116 F.3d 1353, 1359 (10th Cir.1997)).

> The "substantial step" required to establish an attempt must be something beyond mere preparation. It must be an act adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime. A substantial step is an appreciable fragment of a crime and an action of such substantiality that, unless frustrated, the crime would have occurred. The step must be strongly corroborative of the firmness of the defendant's criminal intent and must unequivocally mark the defendant's acts as criminal. It should evidence commitment to the criminal venture. However, it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt.

United States v. Bender, 183 Fed.Appx. at 770 (quoting *United States v. Smith*, 264 F.3d at 1016). Because "not every act that may be done with intent to produce an unlawful result is unlawful or constitutes an attempt,"

however, the "substantial step" analysis is "a question of proximity and degree [ ] . . . [and] courts examine the overt act to determine whether it is closely connected with the crime which is the object of the attempt." *United States v. Monholland*, 607 F.2d 1311, 1318 (10th Cir.1979)(internal quotations omitted). *See Hyde v. United States*, 225 U.S. 347, 387-88, 32 S.Ct. 793, 56 L.Ed. 1114 (1912)(Holmes, J., dissenting)(explaining that the mere pairing of criminal intent and an overt act are insufficient to sustain an attempt; the two must combine to create a "dangerous proximity to success").

At a minimum, the defendant's substantial step must be "some overt act which would normally result in the commission of the particular crime." *United States v. Horn*, 113 Fed.Appx. 355, 357 (10th Cir.2004). The Court's task is to determine "whether [the defendant's] objective acts, without relying on the intent underlying those acts, strongly corroborate his intent to [commit the crime]." *United States v. Prichard*, 781 F.2d 179, 181 (10th Cir.1986). Nevertheless, the defendant need not be "on the verge of committing the specific act that constitutes the crime." *Id.* at 182. The Tenth Circuit has explained that, "[i]f this were the rule, much of the preventative purpose of inchoate liability could be vitiated." *United States v. Tucker*, 110 F.3d 74, 1997 WL 163523, at *2 (10th Cir.1997)(quoting *United States v. Prichard*, 781 F.2d at 182). Accordingly, "in order to protect the public, modern 'attempt' law allows criminal liability to attach at some point prior to the last proximate act." *United States v. Prichard*, 781 F.2d at 182.

Appendix B

ANALYSIS

Vigil does not dispute, for the purposes of this motion, that the evidence presented at trial was sufficient for a reasonable jury to find beyond a reasonable doubt that he intended to extort Everage. Vigil's argument is limited to his contention that he did not take a substantial step or an overt act toward the commission of the crime. *See* Motion to Acquit at 6. Vigil asserts that "[t]he only overt act [he] could have taken that would have resulted in the commission of a Hobbs Act violation would be to sign the [SLOM] contract." *Id.* Vigil concludes that "[a]ny substantial step other than the foregoing would not proximately lead to the consummation of the intended crime." *Id.*

The United States counters that Vigil's actions constituted "far more than a substantial step." United States' Response at 10. The United States maintains that Vigil attempted to extort Everage by conditioning the award of the SLOM contract on Everage's willingness to share a portion of his potential proceeds with Sais. *See id.* The United States contends that "the only fact that makes this charge an 'attempt' rather than a completed crime is Everage's refusal to give in to [Vigil's] demands." *Id.* The United States argues that Vigil never voluntarily withdrew from his plan to use the SLOM position to provide a job for Sais, and "at every point when there was an obstacle he continued to try to find a way around that obstacle until he was able to successfully find a way to get what he wanted." Transcript of Hearing at 56:22-25 (Yarbrough)(taken December 1, 2006)("Hearing Transcript").

Appendix B

The issue is whether Vigil proceeded far enough down the path toward extortion that the law can find that he committed the crime of attempted extortion. Because the Court believes that Vigil took substantial steps toward the completion of the crime—beyond mere preparation and planning—and that those steps strongly corroborate his intent to commit the crime in a manner that brought his actions within a dangerous proximity of success, the Court will deny Vigil's motion.

I. THE UNITED STATES PRESENTED SUFFICIENT EVIDENCE THAT VIGIL TOOK A SUBSTANTIAL STEP TOWARD COMPLETION OF THE CRIME OF EXTORTION.

Vigil contends that the evidence presented at trial regarding Count Twenty-Four is insufficient to sustain an attempt conviction. The United States disputes Vigil's contention and has enumerated ten alleged actions that it represents constitute a non-exhaustive list of substantial steps: (i) Vigil's inquiry of Everage questioning whether, if Everage were to be awarded the SLOM position, he would be willing to hire Sais; (ii) Vigil's decision to create the SLOM position and his participation in drafting the RFP; (iii) the NMSTO's issuance of a RFP for the SLOM position; (iv) Vigil's direction to Gallegos that she should pressure Everage to hire Sais; (v) Vigil's threatening telephone conversation with Everage after Everage's April 29, 2005 meeting with Sais; (vi) Vigil's personal discussions with Sais to determine the amount of compensation she would deem adequate; (vii) Vigil's statements to Everage

indicating that the amount of compensation Everage had offered Sais was unacceptable; (viii) Vigil's direction that a letter be sent to Everage indicating that he must hire Sais as a condition of receiving the SLOM position; (ix) Vigil's direction that the NMSTO's offer to Everage be rescinded; and (x) the NMSTO's award of the second SLOM contract to Perkins. *See id.* at 9-10. In addition, the United States contends that Everage suffered actual harm from Vigil's attempted extortion—losing out on the SLOM position that he tentatively received—and suggests that this harm is significant evidence that Vigil's conduct was criminal. *See* Transcript of Hearing at 39:25-40:5 (Yarbrough).

Vigil characterizes each of the United States' enumerated "substantial steps" as "merely menaces, preparation and planning," and argues that, "[e]ven when taken in the light most favorable to the government, none of these facts, either individually or taken in the aggregate, amount to a substantial step toward the commission of the crime charged." Reply to United States' Response to Motion to Set Aside Verdict and for Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 as the Evidence is Insufficient to Sustain a Conviction at 7, filed November 13, 2006 (Doc. 421) ("Vigil's Reply"). Consequently, Vigil's argument depends on a characterization of the facts that the jury had before it. Vigil contends that he and Everage merely engaged in unsuccessful contract negotiations regarding Sais. *See* Motion to Acquit at 6. Vigil appears to argue that, even if he intended to extort Everage, an admission he does

not concede, directing Everage to work out an arrangement with Sais is nothing more than a preparatory act. *See id.* Vigil contends that "between preparation for the attempt and the attempt itself, there is a wide difference," and although he concedes that preparatory acts may demonstrate his intent, he asserts that "something more than mere intention is necessary to constitute the offense charged." Vigil's Reply at 6 (quoting *People v. Murray*, 14 Cal. 159, 159 (1859)).

Vigil compares his case to *People v. Miller*, 2 Cal.2d 527, 42 P.2d 308 (1935), a case the Tenth Circuit cited in *United States v. Monholland* in support of a distinction between acts of mere preparation and overt acts that, when combined with the requisite criminal intent, will sustain an attempt conviction. *See* Motion to Acquit at 7. The defendant in *People v. Miller*, Charles Miller, was convicted of attempted murder based on evidence that he had, while under the influence of alcohol, publically threatened to kill an African-American farmworker, Albert Jeans, because, Miller alleged, Jeans had been annoying his wife and the authorities had refused to address the matter. *See People v. Miller*, 42 P.2d at 308-09. Miller had entered a field where Jeans was at work along with the owner of the field, Ginochio, who was also the town constable. *See id.* at 309. Miller, shouting threats and epithets at Jeans, walked approximately one-hundred yards in a straight line towards Jeans—and while he was still approximately 150 to 200 yards from Jeans—stopped and appeared to load his rifle. *See id.* Jeans, upon observing Miller, attempted to flee. *See id.* Miller continued towards Ginochio who took the gun

from Miller without resistance. *See id.* Although the evidence indicated that Miller never aimed the gun at Jeans, the gun was found to be loaded with a .22 caliber high-speed cartridge. *See id.*

The Tenth Circuit in *United States v. Monholland* focused its analysis of *People v. Miller* on the distinction the Supreme Court of California recognized between preparatory acts and overt acts that constitute the commission of an attempt crime.

> Although conceding that it was a close case, it was emphasized that there must be a specific intent to commit the crime and, secondly, a direct ineffectual act done toward its commission. Mere intention to commit a specified crime, the court said, did not amount to an attempt; preparation alone was not sufficient. Something more is required than mere menaces, preparation, or planning. The California court added that preparation involved devising or arranging the means or measures necessary for the commission of the offense. In contrast, the attempt, it was said, is the direct movement towards the commission after the preparations are made. The court further said that the act must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation. It said that some appreciable fragment of the crime must have been committed. It must have

> progressed to a point where it will be consummated unless interrupted. In effect, the court was saying that the act must have passed the preparation stage so that if it is not interrupted extraneously, it will result in a crime. Unless it satisfies these elements, it is not per se indictable as an attempt.

United States v. Monholland, 607 F.2d at 1318-19 (internal quotations and citations omitted). Although the distinction between acts in preparation and overt acts in furtherance of an attempt was important to the Supreme Court of California's holding, the court in *People v. Miller* also acknowledged that, "whenever the design of a person to commit a crime is clearly shown, slight acts done in furtherance of this design will constitute an attempt." 42 P.2d at 310. To reconcile this rule with the court's earlier distinction between "the point where preparation leaves off and execution has commenced," the court in *People v. Miller* focused on the phrase "in furtherance of the design" in the latter rule. *Id.* The court in *People v. Miller* emphasized that acts cannot be said to be an overt act constituting the commencement of the commission of a crime until they cease being equivocal. *See id.* at 310. Accordingly, in finding that Miller's actions could not be characterized as more than preparation, the court in *People v. Miller* noted that "up to the moment the gun was taken from [Miller] no one could say with certainty whether the defendant had come into the field to carry out his threat to kill Jeans or merely to demand his arrest by the constable." *Id.*

Although the Tenth Circuit in *United States v. Monholland* focused on the distinction between preparatory and overt acts, it reached a result consistent with the Supreme Court of California's result in *People v. Miller*. The defendants in *United States v. Monholland* were charged with an attempt to receive explosives in interstate commerce, in violation of 18 U.S.C. § 844(d), with the knowledge and intent that the explosives would be used to kill an Oklahoma State Associate District Judge. *See* 607 F.2d at 1316-17. The only evidence of an act in furtherance of an attempt was limited to a conversation between the defendants and a third-person inquiring into the price of explosives. *See id.* at 1317. In holding the evidence insufficient to sustain an attempt conviction, the Tenth Circuit appeared to focus on the tenuous connection between the acts and the defendants' intent to commit the underlying crime. The Tenth Circuit reasoned: "There is no act on the part of the defendants that can be regarded as directly aimed toward the commission of the offense and which is proximate and germane thereto." *See id.* at 1320.

Vigil argues that, consistent with the Supreme Court of California's reasoning in *People v. Miller*, the acts the United States enumerates were merely preparation, "because they involved devising or arranging the means or measures necessary for the commission of the offense." Motion to Acquit at 6. Vigil argues that, after he made these preparations, he never made a direct movement towards the commission of the crime. *See id.* He contends that his acts thereafter did not reach far enough towards the accomplishment of the desired result

to amount to the commencement of the consummation of the crime. Vigil argues that no appreciable fragment of the crime was ever committed and, therefore, his actions do not satisfy the elements of attempt.

In an attempt to emphasize the preparatory nature of the acts the United States alleges as "substantial steps," Vigil juxtaposes six additional acts which he asserts would have had to occur for the commission of the extortion to take place: (i) the execution of a valid contract between Everage and the NMSTO; (ii) Everage's submission of his recommendations regarding the securities-lending agents' applications; (iii) Vigil's approval of the securities-lending agents that Everage recommended; (iv) the execution of a valid securities-lending contract between one or more securities-lending agents and the NMSTO; (v) the execution of a trade generating commission fees for the SLOM; and (vi) distribution of some portion of the SLOM's fees to Sais pursuant to terms that Everage and Sais agreed upon. *See* Vigil's Reply at 7. Vigil maintains that, because no monies would be generated for the SLOM unless the NMSTO executed a securities-lending transaction, "the only substantial step Vigil could have taken would have been to enter into valid contracts with the [securities-lending agents] and direct a deal to be placed." *Id.* at 8.

Vigil's argument is premised on his assertion that no substantial step could occur until his actions reached a point where, unless circumstances independent of Vigil's will interrupted, a violation of the Hobbs Act was

inevitable. *See* Vigil's Reply at 8; Transcript of Hearing at 9:20-10:1 (Bowles). Vigil cites *People v. Buffum*, 40 Cal.2d 709, 256 P.2d 317 (1953), for the proposition that, to sustain an attempt conviction, the defendant's conduct "must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." *Id.* at 321. He contends that, to get to this point, and establish a sufficient predicate for an attempted extortion conviction, Vigil would have had to order a securities-lending deal to go through and circumstances beyond his control would have had to frustrate that deal. *See* Vigil's Reply at 8. Because the Court believes that Vigil has incorrectly stated the standards that the Tenth Circuit uses to evaluate attempt crimes, and because the Court does not agree that Vigil's conduct would have to progress to the extent Vigil asserts before criminal liability for attempted extortion would attach, the Court does not find Vigil's argument persuasive.

Although the Court recognizes that *People v. Buffum* is not binding precedent for courts in the Tenth Circuit, the Court also believes that it can be distinguished from Vigil's case. The defendants in *People v. Buffum* were convicted of conspiracy to perform abortions in Mexico based on evidence that they made arrangements for transportation and then took women from California to Mexico for the purpose of performing abortions. *See* 256 P.2d at 319. Because the California statute prohibiting abortions made no reference to the place the abortions occurred, and because the Supreme Court of California presumed that

the California Legislature did not intend to regulate extra-jurisdictional conduct, the court in *People v. Buffum* determined that the convictions could only stand if the acts done within California amounted to an attempt to commit illegal abortions. *See id.* at 320.

The court in *People v. Buffum*, like the court in *People v. Miller*, differentiated between preparation and "a 'direct' ineffectual act done towards [a crime's] commission," and stated that, to establish the latter, "there must be some appreciable fragment of the crime committed." *Id.* at 321. The court's holding in *People v. Buffum*, however, did not rely on this distinction, and also like the court in *People v. Miller*, paid particular attention to the defendants' state-of-mind while performing the acts alleged to constitute the attempt. The Supreme Court of California in *People v. Buffum* reasoned that, while coordination and transportation were acts in preparation to performing abortions in Mexico, they were not unequivocal acts done toward the commission of a crime, because California's abortion statute did not regulate conduct outside of California. *See id.* at 320, 321. In contrast, Vigil does not contend—for the purposes of this motion—and the Court does not believe, that the Hobbs Act fails to proscribe the objective of the criminal actions that the United States alleges.[4]

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4. In his Impossibility Motion, filed simultaneously with this motion, Vigil alleged, among other arguments, that even when the evidence was considered in the light most favorable to the jury's verdict, the facts presented at trial did not

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Moreover, while language similar to that the Supreme Court of California used in *People v. Buffum* is not absent from Tenth Circuit jurisprudence, *see United States v. Bender*, 183 Fed.Appx. at 770 ("A substantial step is an appreciable fragment of a crime and an action of such substantiality that, unless frustrated, the crime would have occurred."), the Circuit's caselaw also demonstrates, that, when a defendant's actions corroborate his criminal intent, the policies underlying the prosecution of inchoate crimes dictate that his conduct need not progress to the point of being "on the verge of committing the specific act that constitutes the crime." *United States v. Prichard*, 781 at 181.

In *United States v. Prichard*, the Tenth Circuit considered a defendant's appeal for attempted bank robbery based on the defendant's arguments that his actions did not constitute anything more than preparation. *See* 781 F.2d at 180. The trial evidence in *United States v. Prichard* indicated that the defendant

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(Cont'd)

constitute a violation of the Hobbs Act. Vigil's impossibility argument rested primarily on his assertion that he could not have attempted to extort Everage, because Everage never acquired a property interest from which to extort. The Court has already addressed this argument and determined that the evidence presented at trial was sufficient for a reasonable jury to find beyond a reasonable doubt that Everage had a property interest and that Vigil attempted to obtain that interest with the intent of exercising the rights associated with that interest, or transferring them to Sais, for his own benefit. *See* Impossibility Opinion at 38-47.

had reconnoitered the target bank for one to two weeks to learn the bank manager's system for opening the bank, had learned the make of the bank manager's car, and had prepared a sketch of the bank. *See id.* In addition, after agreeing to perform two robberies—one of the bank and another of a bowling-alley manager—with an accomplice (a Federal Bureau of Investigation informant), the defendant had the accomplice obtain a car, handcuffs, and gloves, and directed the accomplice to ascertain the bank manager's home address. *See id.* The defendant and the accomplice discussed a plan to execute the robberies by holding the managers' families hostage to coerce them into complying with their demands. *See id.* at 181. The defendant was eventually arrested while approaching the bank manager's house on an evening when the evidence indicated that his primary purpose there was merely to observe the house, and during which he was recorded as stating that he intended to rob the bowling-alley manager that evening. *See id.*

The Tenth Circuit in *United States v. Prichard* commenced its analysis with the recognition that "the question of when preparation ends and attempt begins is exceedingly difficult." *Id.* To arrive at a result, the Tenth Circuit stated that it "must determine whether [the defendant's] objective acts, without relying on the intent underlying those acts, strongly corroborate his intent to rob the bank." *Id.* The Tenth Circuit was cautious to point out, however, that, "[b]ecause [the defendant] was convicted, in responding to this inquiry, we must view the evidence in the light most favorable to the government." *Id.*

In finding the evidence was sufficient to sustain an attempted robbery conviction, the Tenth Circuit in *United States v. Prichard* acknowledged that there was ambiguity in the record about precisely which robbery the defendant intended to perform on the night of his arrest, but held that there was sufficient evidence in the record to corroborate his intent to rob the bank. *See id.* at 182. The Tenth Circuit observed that the defendant's actions—observing the bank, ascertaining information about the bank manager's car and home address, and assembling the instruments necessary to commit the crime—were not "insufficient for conviction by virtue of being so 'commonplace that they are engaged in by persons not in violation of the law.' " *Id.* (quoting *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir.1976)). The Tenth Circuit explained that to require a crime to reach a more definite stage would thwart the policies underlying prosecution for inchoate liability:

> The police need not wait until the defendant is on the verge of committing the specific act that constitutes the crime. If this were the rule, much of the preventative purpose of inchoate liability would be vitiated. Instead, in order to protect the public, modern "attempt" law allows criminal liability at some point prior to the last proximate act.

781 F.2d at 182. *See United States v. Tucker*, 110 F.3d 74, 1997 WL 163523, at *2 (quoting *United States v. Prichard* and affirming defendant's attempted bank robbery conviction where defendant reconnoitered the

bank premises, planned his getaway, disguised himself, and walked into a bank, but was arrested before using a prepared note demanding money).

More recent Tenth Circuit cases, including those that couch their "substantial step" analysis in the language Vigil advocates, reach similar conclusions. At the hearing on this motion, Vigil's counsel cited *United States v. DeSantiago-Flores*, and argued that a substantial step must be "adapted to, approximating, and which in the ordinary and likely course of things will result in, the commission of a particular crime." Hearing Transcript at 4:11-17 (Bowles)(quoting *United States v. DeSantiago-Flores*, 107 F.3d at 1478-79). Despite this language, however, the Tenth Circuit's result in *United States v. DeSantiago-Flores* does not support Vigil's position.

The defendant in *United States v. DeSantiago-Flores* had been convicted of attempted money laundering involving an attempt to engage in an unlawful cocaine purchase. *See* 107 F.3d at 1475. The trial evidence presented to the jury indicated that the defendant, a Colorado resident, had been arrested while staying overnight at a hotel in Nevada while on his way to California to purchase cocaine. *See id.* at 1479. The hotel was the same one the defendant had repeatedly used on previous trips to California to buy drugs, and the defendant was found with over $87,000.00 in cash in his possession. *See id.* In addition, a woman who had accompanied the defendant on the trip to California testified that the defendant explained to her that the

police had detained him too soon to catch him with any drugs. *See id.* Finally, a search of the defendant's home revealed only trace amounts of cocaine, although a number of witnesses testified that they had seen larger amounts of cocaine there in the past. *See id.*

The Tenth Circuit in *United States v. DeSantiago-Flores* aggregated these steps and stated that, when "all of the evidence is viewed together, it is sufficient to support an inference of intent and that [the] defendant's money laundering scheme had advanced beyond mere preparation." 107 F.3d at 1479. Unlike Vigil, who argues that an attempt must have progressed to the point where an observer would conclude that the crime has been committed but for the last, ultimate step, *see* Hearing Transcript at 6:16-20; 9:9-11 (Bowles), the Tenth Circuit does not set the bar so high. The Tenth Circuit in *United States v. DeSantiago-Flores* affirmed the defendant's conviction because "[h]is actions toward a course of conducting a prohibited financial transaction are sufficient to provide strong corroboration of his intent to consummate the financial transaction and evidence his commitment to the criminal venture." 107 F.3d at 1479.

Consistent with the result in *United States v. DeSantiago-Flores*, the United States compares this case to the Tenth Circuit's decision in *United States v. Ramirez*, 348 F.3d 1175 (10th Cir.2003). *See* United States' Response at 10-11. The defendant in *United States v. Ramirez* had met with an undercover narcotics officer to discuss a possible methamphetamine sale, and

had reached an agreement on the amount of drugs to be purchased and the location for the sale. *See* 348 F.3d at 1178. Subsequent to making these arrangements, the defendant called the undercover agent and changed the location from an agreed upon restaurant to a motel. *See id.* Although the agent chose not to go to the motel because of safety concerns—and thus the transaction never occurred—there was evidence that the defendant did proceed to the motel. *See id.* at 1180.

In sustaining the defendant's conviction for attempt to possess more than fifty grams of methamphetamine with the intent to distribute, the Tenth Circuit in *United States v. Ramirez* reasoned that arranging the terms and location of the sale, calling to change the location of the sale, and proceeding to the agreed upon location were "act[s] adapted, approximating, and which in the ordinary and likely course of things will result in, the commission of the particular crime." *Id.* at 1181 (quoting *United States v. Smith*, 264 F.3d at 1016). The Tenth Circuit considered it a reasonable inference that, had the undercover agent proceeded to the motel, the narcotics sale likely would have taken place. *See United States v. Ramirez*, 348 F.3d at 1181. The Tenth Circuit in *United States v. Ramirez* concluded by noting that, given that the defendant had been convicted, it must view the evidence in the light most favorable to the government, and that the evidence was sufficient for a rational jury to find each element of an attempt crime. *See id.*

Even more recently, in *United States v. Bender*, the Tenth Circuit affirmed the conviction of a defendant who had been convicted of possession of a firearm in furtherance of an attempt to distribute cocaine. *See* 183 Fed.Appx. at 770-71. The defendant in *United States v. Bender* had argued that the "substantial step" necessary to sustain the attempt element of his offense—that he attempted to distribute cocaine—could not have occurred until his accomplice approached a motel on foot, walking away from the defendant's parked car, to execute a drug sale the defendant had assisted to arrange. *See id.* at 770. The Tenth Circuit, despite describing a substantial step as "an action of such substantiality that, unless frustrated, the crime would have occurred," determined that the defendant's argument took a narrow view of the substantial step requirement. *Id.*

The Tenth Circuit in *United States v. Bender* held that a reasonable jury could have concluded that numerous earlier steps corroborated the defendant's intent to distribute cocaine: (i) the defendant had provided a small amount of cocaine to an associate with the intent that the associate sell the cocaine; (ii) the defendant had delivered a sample of cocaine to an individual who was described at trial as the "middleman" in the frustrated motel sale that led to the defendant's arrest; (iii) the defendant had retrieved a hidden parcel of cocaine to sell at the motel; and (iv) the defendant had participated in telephone calls necessary to arrange the frustrated motel sale. *See id.* at 770-71. The Tenth Circuit again acknowledged that "the determination as

to whether an action amounts to a substantial step or mere preparation is highly fact specific," but concluded "that the evidence was sufficient to allow the jury to find that these events were indicative of [the defendant's] requisite intent to distribute cocaine and also represented a substantial step toward that distribution." *Id.*

Similar to the Tenth Circuit in *United States v. Prichard*, *United States v. Ramirez*, and *United States v. Bender*, the Court is cognizant of the fact that Vigil was convicted of attempted extortion, and therefore the Court must view the evidence in the light most favorable to the jury's verdict. Evaluated in that light, Vigil's argument overlooks evidence of a number of steps that—individually and cumulatively—a reasonable jury could find corroborate his intent to extort Everage. Moreover, because Vigil's argument concentrates on his contention that Everage had no entitlement to payment, even under a signed contract for the SLOM position, he does not address whether the steps the United States alleges might corroborate Vigil's intent to extort non-monetary property interests, including the right to compete for government contracts on a level-playing field, the right to contract with parties of Everage's choosing, the right to make business decisions free of coercion, and the right to decide with whom to work. The Court believes that, with respect to these interests, the evidence presented at trial was sufficient for the jury to conclude that Vigil attempted to extort Everage, and that he took substantial steps towards, if not succeeded in, that extortion.

Appendix B

The Court believes that, given Tenth Circuit caselaw, the jury could have found that a number of the steps the United States alleges were direct actions towards the commission of extortion and corroborative of Vigil's commitment to the criminal venture. The evidence presented at trial indicated that Vigil inquired of Everage whether, if he received the SLOM position, he would consider hiring Sais. *See* Everage Direct Examination at 37:5-12. Vigil authorized the creation of the SLOM position and participated in drafting the RFP for the position. *See id.* at 43:6-16. The NMSTO issued the RFP to the public on or about April 18, 2005. *See* SLOM RFP. Everage testified that, during his telephone conversation with Vigil subsequent to his April 29, 2005 meeting with Sais, Vigil conveyed to him that, if he did not hire Sais, he would not be considered for the SLOM position. *See* Everage Direct Examination at 61:3-6.

The United States presented evidence that Vigil personally spoke to Sais to determine what amount of compensation she would deem adequate. *See* Government's Exhibit 591-T at 4. Based on these conversations, and in response to Everage's and Sais' inability to reach an agreement on Sais' compensation, Vigil indicated to Everage during a June 13, 2005 telephone call that he was dissatisfied with Everage's offer to Sais and expressed to Everage that "we're not gonna be able to make this contract if you're over here . . . trying to put a crap on it." *Id.* at 3.

On June 23, 2005, Gallegos wrote to Everage explaining that he "must surely recognize that in

responding to the RFP, and including [Sais] as a proposed subcontractor, that [the NMSTO's] evaluation of [Everage's] proposal would include an evaluation of the knowledge, skills and abilities you [and Sais] both offer." Gallegos Letter at 1. Gallegos' letter explained that, should Everage fail to satisfactorily respond to the letter by July 8, 2005, the NMSTO would consider his bid withdrawn and reissue the RFP. *See id.* at 2. Finally, the NMSTO eventually issued a second RFP, awarded the contract to Perkins, and Vigil told Perkins that Sais would receive fifty percent of the commissions Perkins earned from securities lending. *See* Sept. 18 Transcript at 49:4-10.

Vigil's argument that additional steps are necessary to constitute the substantial step necessary for an attempted extortion conviction overstates the substantial-step requirement and misunderstands the nature of the property interest the jury could have found Vigil was attempting to extort. Each of the acts the United States alleges, taken individually, evidences Vigil's intent to obtain a property interest belonging to Everage, and either to exercise it himself or to transfer it to Sais to his profit. More important, none of the acts, considered individually, was essential for the jury to reach a guilty verdict on Count Twenty-Four; "[a]ll [these] acts were rather part of a single course of conduct culminating in the charged 'attempt.' " *United States v. Resendiz-Ponce*, at 788. As the Supreme Court recently explained, "the unity of the plan embraces all the parts." *Id.* (quoting *Swift & Co. v. United States*, 196 U.S. 375, 396, 25 S.Ct. 276, 49 L.Ed. 518

(1905)(Holmes, J.)). Vigil's actions were sufficient to provide the jury "strong corroboration of his intent to consummate the financial transaction and evidence his commitment to the criminal venture." *United States v. DeSantiago-Flores*, 107 F.3d at 1479.

Finally, Vigil, citing *People v. Bracey*, 41 N.Y.2d 296, 392 N.Y.S.2d 412, 360 N.E.2d 1094 (1977), contends that, even if the acts the United States alleges are acts in furtherance of his criminal aim, they do not reach the level of attempt because they do not carry the project forward to within a dangerous proximity to the criminal end. *See* Vigil's Reply at 7. Vigil's argument is not compelling for two reasons. First, *People v. Bracey* was not a "substantial step" case, but a case in which the Court of Appeals of New York evaluated whether the defendants had the requisite criminal intent to sustain an attempted robbery conviction. *See* 392 N.Y.S.2d 412, 360 N.E.2d at 1097-98 (noting that the case "poses an unusual problem . . . [because in] most attempt cases, the defendant's actual intent or purpose is not in issue and the only questions are whether he committed an overt act that went beyond the stage of mere preparation"). In outlining the legal background to the court's analysis, the court in *People v. Bracey* stated that a substantial step is an act that carries "the project forward within dangerous proximity to the criminal end to be attained," but the court also noted that "[t]he act need not be 'the final one towards the completion of the offense.'" *Id.* at 1097. Nevertheless, the Court of Appeals of New York decided without analysis that the acts in question—menacing a candy store and attempting to

enter the store with a pellot pistol—if coupled with the requisite criminal intent for robbery, "clearly demonstrated that they came dangerously close to their goal." *Id.*

Second, the Court believes that a reasonable jury could have concluded that Vigil came dangerously close to successfully extorting Everage. Indeed, the Court has already found that a reasonable jury could have determined that the property interest Vigil attempted to extort was Everage's right to make business decisions free from coercion and to contract with parties of his own choosing; under these theories, a reasonable jury might have concluded that Vigil actually succeeded in extorting Everage. In any case, the evidence of Vigil's actions was sufficient to establish that he came dangerously close to succeeding in extorting Everage. If Everage had gone along with Vigil's wishes, there is nothing but Vigil's speculation to suggest that the extortion would have not been completed. Based on the trial evidence, a reasonable jury could have concluded that, had Everage acted with complicity, the extortion attempt would have succeeded.

II. THE FACTUAL DISPUTES OR DISAGREEMENTS DO NOT PRECLUDE A FINDING OF A SUBSTANTIAL STEP.

To avoid the conclusion that he took a number of substantial steps toward completion of the crime, Vigil also contends that evidence in the record does not support a number of the ten "substantial steps" the

United States alleges. The Court has carefully reviewed the record and believes that the record supports the conclusion that Vigil took substantial steps toward completion of the crime. In reaching its conclusion in Part I, the Court has narrowed the United States' factual allegations to the extent that the Court believes the trial record supports them. Although the Court believes that, in bringing certain steps to the Court's attention, the United States has placed an advocate's spin on the factual record, the Court does not believe that any individual fact is wholly unsupported in the record or that the United States' suggested inference from the evidence is unreasonable. Moreover, even if some of the ten steps are not adequately supported in the record, the remaining steps support a finding of a substantial step.

Vigil first disputes the United States' step (iii): "[Vigil] set this kickback scheme into motion by directing the NMSTO to issue a RFP for the SLOM position. As [Vigil] knew at the time, he would force anyone who wanted this position to hire Sais." United States' Response at 9. *See* Vigil's Reply at 2. Vigil contends that there is no evidence pertaining to his state of mind regarding whether he would force parties interested in the SLOM position to hire Sais. *See* Vigil's Reply at 2.

The Court notes that, in reaching its conclusion in Part I, it limited its consideration of the United States' step three to the fact that the NMSTO issued a RFP for the SLOM position; it did not make any assumptions regarding Vigil's state of mind with respect to Sais or

necessarily characterize, based on this fact alone, the NMSTO's interest in securities lending as a "kickback scheme." The Court recognizes, however, that intent is most often proved by circumstantial rather than direct evidence. Here, there is ample evidence from which a reasonable jury could conclude that Vigil intended to force anyone who got the SLOM position to hire Sais. As an example, the jury heard a recorded conversation in which Vigil told Nelson that he was unconcerned with whether Everage submitted a response to the second SLOM RFP, because his primary concern was "trying to give [Sais] a job." Government's Exhibit 598-T at 71.

Vigil disputes the United States' step (v): "At the suggestion of [Vigil's] agent, Everage met with Sais on April 29, 2005. He did not reach an agreement with Sais as [Vigil] wanted. As a result, on May 2, 2005, [Vigil] personally threatened Everage by telling Everage that he would not get the SLOM position unless he reached an agreement with Sais." United States' Response at 9. *See* Vigil's Reply at 9. He contends that there is no evidence that Vigil ever personally threatened Everage. *See* Vigil's Reply at 2.

In reaching its conclusion the Court did not consider the United States' assertion that Everage met with Sais at the suggestion of Vigil's agent, because the record is somewhat unclear on this point. Everage testified that after he left his employment at the NMSTO, Gallegos called him inquiring whether he had reached an employment agreement with Sais. *See* Everage Direct Examination at 51:2-10. Everage acknowledged,

however, that it was he, and not Gallegos, who insisted that, before he hire Sais, he should meet with her in person. *See id.* at 51:12-14.

The Court believes that a reasonable jury could have determined that, after Everage conveyed to Vigil that he did not wish to hire Sais during a May 2, 2005 telephone call, Vigil threatened him by telling him that he would not get the SLOM position unless he reached an agreement with Sais. Although the May 2, 2005 telephone call was not recorded, *see id.* at 63:11-13, Everage testified that it was his understanding, based on this conversation with Vigil, that, if he did not hire Sais, he would not be considered for the SLOM position, *see id.* at 61:8-9. As the trier of fact, the jury was entitled to assess the evidence and find Everage's testimony credible.

Vigil also disputes the United States' interpretation of Vigil's comment to Everage during a June 13, 2005 recorded telephone conversation, in which Vigil responded to Everage informing him that he had offered Sais the lesser of $45,000.00 or forty-percent of the SLOM's net proceeds: "No, no just deal with this George, we can't, we can't deal with net, it can't work." Government's Exhibit 591-T at 2. The United States contends that, "[b]y using the pronoun 'we,' [Vigil] was obviously referring to himself and [Sais]." United States' Response at 7. Vigil maintains that this assertion is speculation. Vigil's Reply at 2. The Court disagrees. Given the remainder of the conversation, one in which Vigil represents that he had personally spoken to Sais

to determine what amount of compensation she would deem adequate, *see* Government's Exhibit 591-T at 4, and viewing all the evidence in the light most favorable to the United States, a reasonable jury could reach this conclusion.

In an attempt to buttress his assertion that he did not take any substantial steps towards the commission of extortion, Vigil disputes the United States' presumption that a valid contract for the SLOM position existed between Everage and the NMSTO. *See* Motion to Acquit at 6; United States' Response at 8 n. 3. Vigil represents that, pursuant to N.M. Stat. Ann. § 37-1-23, a contract with the State of New Mexico is only enforceable if there is a "valid, written, signed contract." Motion to Acquit at 6. Accordingly, Vigil contends that there could not have been a valid contract between Everage and the NMSTO until the State signed the contract.[5] *See* Vigil's Reply at 2. In addition, Vigil argues

5. The Court notes that N.M. Stat. Ann. § 37-1-23 does not expressly require a signature: "Governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." N.M. Stat. Ann. § 37-1-23(A). New Mexico administrative regulations, however, may require signatures for a contract to be valid. *See* Rule 2.20.2.9(A) NMAC (2007)("The original and at least one copy of every contract, voucher, travel voucher, purchase order or other financial commitment required to be submitted to the department shall be signed by an authorized officer."). In any case, because the Court concludes that the existence of a valid, contractual agreement is not necessary to sustain Vigil's attempted extortion conviction, it need not decide, for the purposes of this motion, whether Vigil's imputation of an implicit signature requirement is a proper construction of N.M. Stat. Ann. § 37-1-23.

that the United States cannot point to evidence that he personally sent the SLOM contract to Everage or that he directed the contract to be sent. *See id.*

Regardless whether a valid contract ever existed, Vigil's argument with respect to the contract's impact on the Court's substantial step analysis is inconsistent. In his Motion to Acquit, Vigil first argues that "[t]he *only* overt act [he] could have taken that would have resulted in the commission of a Hobbs Act violation would be to sign the contract." Motion to Acquit at 6 (emphasis in original). He also states, however, that "even if [he] had signed the contract, the substantial step requirement would still not be met." *Id.* at 7 In his Reply, Vigil appears to argue that a valid contract would not be sufficient to sustain his conviction, because additional events would need to occur for fee-generating securities-lending transactions to occur and monies distributed to Sais. *See* Vigil's Reply at 7. At the hearing on this motion, Vigil's counsel reaffirmed his position that, even if a valid contract had been signed, it would not be sufficient to constitute a substantial step. *See* Hearing Transcript at 26:16-27:2 (Bowles).

The Court has already decided, however, that a contractual entitlement to definite, tangible property was not a legal prerequisite to Everage establishing a property interest that Vigil could attempt to extort. *See* Impossibility Opinion at 38-47. A reasonable jury could have concluded that Vigil attempted to extort more than the proceeds to which Everage would have been entitled under any contract. More pertinent is the

consideration that, because Vigil was not convicted of extortion, but of attempted extortion, it is irrelevant that no actual property was extorted; "the offense of attempted extortion is complete when the defendant has attempted to induce his victim to part with property." *United States v. Foster*, 443 F.3d 978, 985 (8th Cir.2006). As Vigil points out in his Motion to Acquit, factual impossibility is not a defense to an attempt charge. *See* Motion to Acquit at 5; *United States v. Mitov*, 460 F.3d 901, 908 (7th Cir.2006)(holding that factual impossibility is no defense to an attempted extortion charge). That Vigil did not take the final steps needed to create the tangible property he wished to extort would not prohibit a reasonable jury from concluding that the steps he did take were adequate to constitute attempted extortion.

The issue whether a legally enforceable contract existed is therefore irrelevant to this motion, and the Court will not focus on that issue in this opinion. A signed contract would have been another step, most likely substantial, among a number of steps that Vigil had already taken, but it was not a necessary step to complete the crime of attempted extortion. The Court believes that, once Vigil discussed hiring Sais with Everage, approved the creation of the SLOM position, sent out the SLOM RFP, tentatively selected Everage, and began to take steps to pressure Everage to hire Sais, he had moved beyond preparation and planning and commenced the commission of the crime.

Finally, in addition to the factual assertions that Vigil specifically disputes, Vigil disputes all factual allegations

that the United States has not supported with proper references to the record. *See* Vigil's Reply at 2. As this opinion reflects, however, the Court has independently reviewed each of the United States' statements about the record and limited its consideration to statements for which it has found support. Accordingly, to the extent the Court has relied on the "substantial steps" the United States presents in its Response to Vigil's Motion to Acquit, the Court concludes that there is sufficient evidence in the record to justify its reliance.

III. THE COURT AND THE JURY CAN CONSIDER THE EVIDENCE INTRODUCED ON THE OTHER COUNTS.

In its Response to Vigil's Motion to Acquit, the United States emphasized evidence that Vigil had transferred illicit monies to Montoya and evidence that Vigil was indebted to Montoya. *See* United States' Response at 3-5. Vigil maintains that the Court should not consider these allegations of a "factual scheme to transfer illegal funds to [Montoya], and receive illegal monies from Montoya and [Garcia]" because Vigil was acquitted of this conduct. Vigil's Reply at 1. Vigil cites no authority for this sweeping proposition, and the Court is not aware of any. To the contrary, the jury was instructed to consider all of the evidence presented at trial and was authorized to draw all reasonable inferences that the evidence supported. *See* Jury Instructions, Instruction No. 6, at 8. Moreover, because criminal intent is an element of an attempt crime, the evidence that the United States highlights is especially relevant, and the jury was entitled to consider it.

Appendix B

Much of the evidence the United States presented was intended to prove Vigil's guilt of other crimes for which he was charged. There is no assurance, however, that the United States would have presented less evidence, or that the trial would have been abbreviated, if the United States had only sought conviction on Count Twenty-Four. A reasonable jury may have decided that the evidence the United States emphasizes in its Response was helpful to explain the nature of Vigil's relationship with Montoya, and Vigil's motive to help Montoya. Some evidence might have gone to the pattern that had been used to pay Montoya in the past and to introduce the individuals involved in that scheme. Vigil has not adequately explained why the jury, and now the Court, cannot consider that evidence in evaluating the sufficiency of the evidence for Count Twenty Four. The Court believes that the evidence is relevant and that it is helpful to place the conduct for which Vigil was convicted in its appropriate context, and will consider the evidence.

Taking the evidence in the light most favorable to the United States, the evidence against Vigil with respect to Count Twenty-Four is sufficient for a reasonable jury to conclude that Vigil intended to extort Everage and that he took a substantial step that corroborated his intent. The Court will not acquit Vigil of the charge in Count Twenty-Four of the Fifth Superseding Indictment. There is sufficient evidence for the Court to find that Vigil's actions satisfy the elements of the inchoate crime of attempt and to sustain a conviction.

IT IS ORDERED that the Defendant's Motion to Set Aside Verdict and for Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 as the Evidence is Insufficient to Sustain a Conviction is denied.

s/ James O. Browning
UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED JANUARY 12, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CR 05-2051 JB

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT VIGIL,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Defendant Robert Vigil's Motion to Set Aside Verdict and for Judgement of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 or in the Alternative for New Trial on Count 24, filed October 5, 2006 (Doc. 411) ("Motion to Acquit"). The Court held a hearing on this motion on December 1, 2006. The primary issues are: (i) whether the evidence was sufficient for a reasonable jury to find beyond a reasonable doubt that Vigil attempted to extort property from George Everage through the wrongful

use of fear of economic harm and under color of official right; (ii) whether the jury's verdict finding Vigil guilty of attempted extortion under the Hobbs Act is invalid as a matter of law because the victim of the attempted extortion, Everage, never acquired a property interest from which to extort; (iii) whether the evidence the United States presented at trial established a nexus between Vigil's conduct and interstate commerce; and (iv) whether Vigil's conviction offends due process because the Hobbs Act does not provide adequate notice that the conduct the United States alleged violates the Act. Because the Court finds that the evidence is sufficient to convict Vigil under either of the alternate theories upon which the Court instructed the jury, that Everage's reasonable belief in some form of economic profit resulting from a contract with the New Mexico State Treasurer's Office ("NMSTO") established a property interest, that the attempted extortion possessed the requisite nexus to interstate commerce, and that Vigil's conviction does not offend due process, it finds that a reasonable jury could have found beyond a reasonable doubt that Vigil attempted to extort property from Everage, and will therefore deny the motion.

FACTUAL BACKGROUND

Much of the factual evidence pertinent to this motion is not in dispute. Vigil does not seriously contend that the evidence presented at trial was insufficient for a reasonable jury to find that Vigil intended to extort Everage or that he took some steps toward extorting

Everage. The issue is whether, as a matter of law, Vigil's conduct constitutes a violation of the Hobbs Act.

1. ***Evidence of Vigil's Motive to Commit the Crime.***

The United States contends that it presented evidence at trial of several factors that motivated Vigil, while serving as the New Mexico State Treasurer, to transfer funds to Michael Montoya, the former State Treasurer who preceded Vigil. *See* United States' Response to Motion to Set Aside Verdict and For Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 as the Evidence is Insufficient to Sustain a Conviction at 3, filed October 19, 2006 (Doc. 412). First, there is evidence that, in 1999, after Vigil was unsuccessful in his bid to run for Governor of New Mexico, Montoya hired Vigil as his Deputy State Treasurer. *See* Transcript of Trial at 158:10-15 (Montoya)(taken September 13, 2006)("Sept. 13 Transcript").[1] There is also evidence that, later, when Vigil ran for the position of Treasurer, Montoya, in combination with Angelo Garcia and Kent Nelson, provided Vigil significant monetary and other support. *See id.* at 242:22-243:12. There was evidence presented that Montoya and Garcia kept a record of these expenditures, that they shared this record with

1. The Court's citations to the transcript of the trial refer to the Court Reporter's original, unedited version. Any final transcript may contain slightly different page and/or line numbers.

Vigil, and that they indicated to Vigil that they, and Nelson, had mutually contributed to cover these expenses. *See id.* at 258:6-14; 263:2-6.

The United States further asserts that it presented evidence that Vigil failed to report these contributions on his campaign finance report forms and knew that Montoya possessed documents through which he could prove Vigil received this money. *See* United States' Response at 4. Montoya testified that he showed these documents to Judy Espinosa, the NMSTO's public relations officer, and Espinosa confirmed that she confronted Vigil about what she believed were contributions missing from his campaign finance reports. *See* Sept. 13 Transcript at 285:2-286:24 (Montoya); Transcript of Trial at 49:11-14 (Espinosa) (taken September 19, 2006)("Sept. 19 Transcript").

In addition, there was also evidence presented that Montoya pressured Vigil by threatening to run against him in the next election. *See* Sept. 13 Transcript at 283:10-15 (Montoya). The jury heard a recorded conversation in which Vigil told Garcia that, if the NMSTO was going to contract with George Everage for securities lending, the NMSTO needed to ensure that Samantha Sais, Montoya's wife, receive a job as part of the transaction. *See* Transcript of Recorded Conversation at 7 (taken February 23, 2005) (Government's Exhibit 589-T) ("Exhibit 589-T"). This statement was followed by Vigil's acknowledgment that "[Montoya] is all over there telling everybody he's

running for Treasurer." *Id.* Similarly, during a conversation with Nelson on May 2, 2005, Vigil indicated that he felt he could prevent Montoya from running for State Treasurer by securing Sais a job in the securities-lending project. *See* Transcript of Recorded Conversation at 38-39 (taken May 2, 2005) (Government's Exhibit 592-T).

2. ***Securities Lending***

Everage testified that he proposed to Vigil that the NMSTO initiate a securities-lending program to earn additional income on the office's securities inventory. *See* Transcript of Direct Testimony of George Everage at 23:7-19 (Everage)(taken September 15, 2006) ("Everage Direct Examination"). Everage indicated that Vigil was initially reluctant because of his awareness that other state agencies had enjoyed varying degrees of success implementing similar programs. *See id.* at 24:24-25:3. In response to Vigil's concerns, Everage suggested that the NMSTO could use multiple securities-lending agents, and bid the project out to the various agents to create competition and to ensure the NMSTO a better yield on its lending activity. *See id.* at 25:17-21. Everage estimated that the NMSTO could earn between one and three million dollars annually through the securities-lending program. *See id.* at 31:19-23. Everage understood, however, that the securities-lending program had the potential to not make money or to make less money than he estimated. *See id.* at 149:10-15; Transcript of Cross-Examination and Redirect-Examination of George Everage at 13:21-14:1

(Everage)(taken September 18, 2006)("Everage Cross-Redirect").

To institute the securities-lending program, Everage recommended that the NMSTO create a position—securities-lending oversight manager ("SLOM")—to oversee the securities-lending agents and to ensure the agents complied with the NMSTO's investment policy. *See* Everage Direct Exam at 27:15-22. Everage stated that when he proposed the securities-lending plan to Vigil, he told Vigil that a NMSTO employee could handle the SLOM position's duties "in-house," or the NMSTO could contract with a third-party to act as the SLOM. *Id.* at 32:4-12. Everage represented that Vigil decided to issue a contract for the SLOM position, because the NMSTO did not have the budgetary resources to have an in-house employee perform the job functions. *See id.* at 36:9-14. Everage also understood that the New Mexico Legislature never allocated the NMSTO funds to have the SLOM position funded in-house. *See* Everage Cross-Redirect at 37:12-15. Upon learning that the NMSTO would contract the SLOM position, Everage informed Vigil that, if and when the securities-lending program was implemented, Everage would like the opportunity to bid on the contract for the SLOM position. *See* Everage Direct Examination at 36:22-23.

Everage, in association with several other NMSTO employees—Vigil, Assistant State Treasurer Ann Marie Gallegos, Deputy State Treasurer Elaine Olah, the NMSTO's counsel, Dave Romero, and the NMSTO's

Investment Advisor, Mark Canavan—drafted a request for proposals ("RFP") for the SLOM position. *See id.* at 43:6-16; Notice of Request for Proposals for Securities Lending Oversight Manager (Government's Exhibit 512) ("SLOM RFP"). Among the provisions included in the RFP for the SLOM position was a prohibition against subcontracting work the SLOM would perform on behalf of the NMSTO. *See* Everage Direct Examination at 46:8-14; SLOM RFP, Part II.C ¶ 4. The RFP for the SLOM position also indicated that the State Treasurer could terminate any contract between the NMSTO and the SLOM at will. *See* Everage Cross-Redirect at 22:2-4; 22:11-14; SLOM RFP, Professional Service Contract ¶ 5. Finally, the RFP established that the SLOM would be paid a fee calculated as a percentage of the value of securities that the NMSTO's lent. *See* Everage Cross-Redirect at 35:17-23; SLOM RFP, Professional Service Contract ¶ 2.

Everage testified that, when he informed Vigil that he was interested in applying for the SLOM position, Vigil indicated that he had a friend whose wife needed a job and inquired if Everage would be willing to hire her should he receive the SLOM contract. *See* Everage Direct Examination at 37:5-12. Everage learned that this woman was Sais. *See id.* at 38:3-9. Everage testified that Vigil told him that Sais "was being a pain in his ass," and that he would appreciate Everage assisting him in "get[ting] her off his ass." *Id.* at 41:13-15.

3. *SLOM Contract.*

At Vigil's request, Romero performed an evaluation and determined that the NMSTO could legally award the SLOM contract to a former state employee. *See id.* at 49:13-24. On April 15, 2005, Everage left his position at the NMSTO with the intention of seeking the SLOM contract. *See id.* at 43:17-22; 44:1-4.

On April 29, 2005, Everage met with Sais in Albuquerque to discuss her professional background and qualifications. *See id.* at 53:8-14. Based on this meeting, Everage concluded that Sais did not have any knowledge regarding securities lending, and decided that he did not wish to hire her. *See id.* at 59:24-60:10. In addition, during their April 29, 2006 conversation, Sais represented to Everage that Vigil owed favors to Montoya and that Montoya was contemplating running against Vigil for State Treasurer in 2006. *See id.* at 60:17-21. Subsequent to his meeting with Sais, Everage called Vigil to discuss the results of the meeting. *See id.* at 61:3-6. Everage testified that, based on this conversation with Vigil, it was his understanding that, if he did not hire Sais, he would not be considered for the SLOM position. *See id.* at 61:8-9.

Everage submitted a bid for the SLOM contract on May 3, 2005; his bid did not include any role for Sais as part of his contract performance. *See id.* at 62:12-17. Everage acknowledged that, at the time he submitted his application for the SLOM position, he did not have a vested right in the SLOM contract, and that Vigil had

the authority to cancel the NMSTO's request for proposals and/or not to proceed with the securities-lending program. *See id.* at 77:20-78:6.

Everage faxed an addendum to his bid for the SLOM contract to the NMSTO on May 12, 2005. *See id.* at 81:7-8. This addendum characterized Sais as a subcontractor, indicated that Sais would send her resume directly to the NMSTO, and represented that Everage would employ Sais as a subcontractor if the NMSTO specifically approved the use of a subcontractor. *See id.* at 81:20-24. Everage also drafted a Memorandum of Understanding documenting the terms of his agreement with Sais. *See* Everage Cross-Redirect at 26:14-17. Everage testified that he and Sais never signed the Memorandum of Understanding and the NMSTO never sent him an amended version of the contract authorizing the use of subcontractors. *See* Everage Direct Examination 130:7-14; Everage Cross-Redirect at 28:10-12.

Everage testified that, at some point between May 12, 2005 and May 30, 2005, someone from the NMSTO called him and told him that the NMSTO would send him the responses to a request for proposals regarding securities-lending that the NMSTO had distributed to securities-lending agents. *See* Everage Direct Examination at 85:24-86:2. Everage also stated that he received from the NMSTO a contract for the SLOM position that had changed the conditions of the original proposal he had submitted to the office and requested that he sign and return the contract. *See id.* at 86:15-

18. Everage signed the contract and returned it to the NMSTO along with a request that Vigil sign a copy of the contract and return it to Everage. *See id.* at 88:4-9. Everage testified that, when he signed the contract and returned it to the NMSTO, he believed that the contract had been consummated. *See id.* at 91:7-14. Everage testified that, accordingly, the NMSTO sent him the bid proposals of three securities-lending agents and that he reviewed and evaluated these agents' applications for the securities-lending agent position. *See id.* at 93:17-22; 94:3-5. Finally, Everage also indicated that he had been invited to attend a June 16, 2005 meeting that had been scheduled so that NMSTO's securities-lending evaluation committee could consider the securities-lending agents' applications. *See id.* at 97:17-21.

On June 10, 2005, Everage met with Sais for a second time in an attempt to negotiate a fee-sharing arrangement for fees generated through the SLOM position. *See id.* at 102:7-9. At the conclusion of this meeting, Everage made a final determination that he would not be able to employ Sais. *See id.* at 105:14-18. Following this meeting, on June 13, 2005, Everage spoke to Vigil by telephone. *See id.* at 105:19-23. Everage indicated to Vigil that he had offered Sais forty percent of the SLOM's net proceeds, and Vigil replied: "No, no just deal with this George, we can't, we can't deal with net, it can't work." Transcript of Recorded Conversation at 2 (recorded June 13, 2005)(Government's Exhibit 591-T). It was Everage's understanding as a result of this conversation that Vigil was unhappy that Everage and Sais could not reach some arrangement, and Everage

felt that Vigil was threatening to cancel his contract with the NMSTO if Everage and Sais could not resolve their disagreement. *See* Everage Direct Examination at 111:11-12; 112:9-12; Everage Cross-Redirect at 80:4-7.

At Vigil's advice, Everage followed up his conversation with Vigil by calling Gallegos. *See* Everage Direct Examination at 122:8-9. After speaking to Gallegos, Everage considered his prospects of working as the SLOM to be extinguished. *See id.* at 122:14-16. Everage documented his concerns regarding what he perceived as Sais' attempt to extort the NMSTO in a letter to Vigil dated June 13, 2006. *See id.* at 122:24-123:1. In the letter to Vigil, Everage summarized his position: "I would hope that the threat made by you and Ms. Gallegos, that is, if Ms. Sais's demands are not met by [Everage], that the existing SLOM contract will be repudiated and a new RFP issued and by implication that [Everage] will likely not be re-selected as SLOM for securities lending, will not be acted upon." Letter from George Everage to Robert Vigil at 2 (dated June 13, 2005) (Government's Exhibit 521). *See* Everage Direct Examination at 126:7-13.

The NMSTO responded to Everage's June 13, 2005 letter in a letter dated June 23, 2005. *See* Everage Direct Examination at 128:21-129:1; Letter from Ann Marie Gallegos to George Everage (dated June 23, 2005)(Government's Exhibit 528) ("Gallegos Letter"). The NMSTO's letter asserted that, at the time of the letter's writing, there was no legal contract in effect between Everage and the NMSTO. *See* Everage Direct

Examination at 129:15-17; Gallegos Letter at 1. The letter further indicated that prior communications were an attempt to negotiate acceptable terms, not actual or implied threats, and that Everage "must surely recognize that in responding to the RFP, and including Ms. Samantha Sais as a proposed subcontractor, that [the NMSTO's] evaluation of [Everage's] proposal would include an evaluation of the knowledge, skills and abilities you [and Sais] both offer." Gallegos Letter at 1. *See* Everage Direct Examination at 129:23-130:2; Everage Cross-Redirect at 66:2-5. The letter concluded:

> In any event, we must conclude negotiations or failing that, reissue the RFP and hope for more satisfactory responses. Should you fail to respond to this request by 5:00 p.m. July 8, 2005, we will consider your offer withdrawn and will proceed with the re-issuance of the RFP for a Securities Lending Oversight Manager.

Gallegos Letter at 2 (bold emphasis in original). *See* Everage Direct Examination at 131:10-16. Everage noted that Romero was among the recipients carbon-copied on the letter. *See* Everage Direct Examination at 131:25-132:8.

Everage responded to the NMSTO's letter in a letter dated July 7, 2005. *See* Everage Direct Examination at 132:19-23; Letter from George Everage to Ann Marie Gallegos (dated July 7, 2005) (Government's Exhibit 529) ("Everage Response

Letter"). In the letter, which Everage's wife, an attorney, assisted in drafting, Everage argued that there was a legal contract in effect between Everage and the NMSTO and that, in preparing the report evaluating the securities-lending agents that had submitted bids to the NMSTO, Everage had performed pursuant to that contract. *See* Everage Response Letter at 1; Everage Direct Examination at 133:20-134:6. Everage further maintained that his failure to employ Sais could not invalidate the contract because Sais was a subcontractor, the contract expressly prohibited subcontracting, and that the contract had never been amended or reformed to allow subcontracting. *See* Everage Response Letter at 1; Everage Direct Examination at 134:13-20. In a letter dated July 15, 2005, Romero responded to Everage's letter alleging Everage's legal analysis was flawed, and re-asserting that no contract existed between Everage and the NMSTO. *See* Everage Direct Examination at 139:1-9; Letter from Dave Romero to George Everage (dated July 15, 2005) (Government's Exhibit 530).

Everage testified that he did not lose any money as a result of the NMSTO cancelling any SLOM contract he might have had. *See* Everage Cross-Redirect at 16:4-6. Everage did acknowledge, however, that he had indicated to Sais, in a tape-recorded conversation, that he lost $5,000.00 to $6,000.00 per month in projected earnings as a result of the NMSTO rescinding his contract. *See id.* at 17:1-2; 17:11-16. Everage emphasized that these were projected losses; he testified that "[t]here was no money for me to lose. I never had it in my hand." *Id.* at 20:10-11.

4. *The Second RFP.*

On August 9, 2005, the NMSTO issued a revised RFP for the SLOM position. *See* Request for Proposals for Professional Services to Provide Securities Lending Oversight Manager Services to the Office of the New Mexico State Treasurer at 5 (Government's Exhibit 532)("Second SLOM RFP"). The Second SLOM RFP contained a provision that granted the NMSTO the discretion to bifurcate the SLOM position into two components and award separate contracts to: (i) a securities-lending manager; and (ii) an information technologies ("IT") manager. *See id.*, Part I.C.

Andrew Perkins, a former contract employee at the NMSTO, submitted a bid in response to the Second SLOM RFP. *See* Transcript of Trial at 38:13-15 (Perkins) (taken September 18, 2006)("Sept. 18 Transcript"). Perkins' proposal indicated that he was partnered with Thomas Chepucavage, an individual with a bachelor's degree in information technology and professional experience as an information technology consultant with Accenture Consulting. *See id.* at 40:2-10. Perkins was aware, however, that two or more contracts could be awarded. *See id.* at 60:2-6.

Several days after receiving Perkins' response to the Second SLOM RFP, Gallegos contacted Perkins and informed him that the NMSTO had awarded the IT portion of the SLOM contract to Sais. *See id.* at 45:10-12. At a subsequent meeting at the NMSTO involving Vigil, Perkins, Sais, and Gallegos, Vigil informed Perkins

that thirty percent of the fees generated through securities-lending would be allocated to Perkins' firm, and that Sais would receive half of that thirty percent. *See id.* at 49:4-10. Perkins testified that he would have preferred to work with Chepucavage, but did not believe working with Sais was optional. *See id.* at 50:20-51:5.

PROCEDURAL BACKGROUND

On July 25, 2006, a grand jury returned a Fifth Superceding Indictment charging Vigil with twenty-four counts of racketeering and extortion in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c)-(d), and the Hobbs Act, 18 U.S.C. §§ 1951 & 1952. *See* Fifth Superceding Indictment, filed July 25, 2006 (Doc. 259). The Court held a jury trial in this case from September 5, 2006 to September 30, 2006. On September 28, 2006, at the close of the United States' evidence, Vigil moved, under rule 29 of the Federal Rules of Criminal Procedure, to dismiss all charges. The Court took the motion under advisement, but indicated to the parties that it was inclined to submit all the counts to the jury. *See* Transcript of Trial at 147:2-149:1 (Court)(taken September 28, 2006). Subsequent to the Court reserving its ruling, Vigil chose not to present any evidence. The jury returned a verdict on September 30, 2006 finding Vigil not guilty on Counts One through Twenty-Three and guilty on Count Twenty-Four of the Fifth Superceding Indictment. *See* Verdict, filed September 30, 2006 (Doc. 408).

Appendix C

Count Twenty-Four of the Fifth Superseding Indictment charges:

> Between May 2, 2005 and September 15, 2005, both dates being approximate and inclusive, in the State and District of New Mexico, the defendant Robert Vigil, did knowingly and unlawfully affect and attempt to affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, in that the defendant Robert Vigil attempted to cause George Everage to provide money and property to another person, with Everage's consent, induced by wrongful use and threat of use of economic harm and under color of official right, in connection with Everage's efforts to work as the Securities Lending Oversight Manager for the New Mexico State Treasurer's Office.

On October 5, 2006, Vigil filed this motion requesting the Court, pursuant to rule 29 of the Federal Rules of Criminal Procedure, acquit him as a matter of law on Count Twenty-Four of the Fifth Superseding Indictment. In the alternative, Vigil moves for a new trial on that count.

Appendix C

RULE 29

Rule 29(b) of the Federal Rules of Criminal Procedure permits a trial court to reserve decision on a defendant's motion for judgment of acquittal, made at the close of the government's evidence, and to submit the case to the jury. *See* Fed.R.Crim.P. 29(b). If the court submits the case to the jury, and the jury returns a guilty verdict, the defendant may renew his motion within seven days after a guilty verdict. *See* Fed.R.Crim.P. 29(c). The rule provides that, if the trial court decides to reserve its decision, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed.R.Crim.P. 29(b).

STANDARD FOR DECIDING MOTIONS FOR ACQUITTAL

The Supreme Court of the United States has long recognized the government's burden to prove every element of a criminal charge beyond a reasonable doubt as a constitutional imperative. *See In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This requirement, applied though the rules of evidence consistent with that standard, is a "historically grounded right[ ] of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property." *Id.* (quoting *Davis v. United States*, 160 U.S. 469, 488, 16 S.Ct. 353, 40 L.Ed. 499 (1895)).

Appendix C

When reviewing challenges to the sufficiency of evidence underpinning a criminal conviction, courts must evaluate the direct and circumstantial evidence, together with all reasonable inferences that might be drawn from that evidence, in the light most favorable to the government, and determine whether a reasonable jury could find the defendant guilty beyond a reasonable doubt. *See United States v. Isaac-Sigala*, 448 F.3d 1206, 1210 (10th Cir.2006). A court should "not overturn a jury's finding unless no reasonable juror could have reached the disputed verdict." *United States v. Carter*, 130 F.3d 1432, 1439 (10th Cir.1997). The court should let stand the conviction where a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. McPhilomy*, 270 F.3d 1302, 1307 (10th Cir.2001)(quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

In evaluating a sufficiency-of-the-evidence challenge made after a defendant has presented his case-in-chief, the court is not limited to reviewing the government's case-in-chief alone, but may review the entire record, including evidence that the defendant presents. *See United States v. Delgado-Uribe*, 363 F.3d 1077, 1082 (10th Cir.2004). The court may not, however, weigh conflicting evidence or consider the credibility of witnesses. *See United States v. McKissick*, 204 F.3d 1282, 1289 (10th Cir.2000). It is the jury's responsibility to appraise witness credibility, weigh testimony, draw reasonable inferences, and reach a conclusion as to a defendant's guilt. *See United States v. Cooper*, 375 F.3d

1041, 1044 (10th Cir.2004). The court's duty is to "determine whether the evidence, if believed, would establish each element of the crime." *United States v. Vallo*, 238 F.3d 1242, 1247 (10th Cir.2001)(quoting *United States v. Evans*, 42 F.3d 586, 589 (10th Cir.1994)).

Although the jury's decision is afforded great deference, "the evidence, when viewed in its entirety, must generate more than a mere suspicion of guilt, and where such evidence is equally consistent with both guilt and innocence the conviction cannot be sustained." *United States v. Weidner*, 437 F.3d 1023, 1032 (10th Cir.2006)(quoting *United States v. Fox*, 902 F.2d 1508, 1513-14 (10th Cir.1990)). In reaching a conviction, juries have "wide latitude to determine factual issues and to draw reasonable inferences from circumstantial evidence," but inferences are reasonable only when, "with experience serving as the touchstone[,] . . . there is a reasonable probability that the conclusion flows from the facts in evidence." *United States v. Summers*, 414 F.3d 1287, 1295 (10th Cir.2005)(internal citation omitted). Where an inference relates to an ultimate conclusion underpinning criminal liability, "a jury may draw [the] inference only where that inference can be made beyond a reasonable doubt." *Id.* at 1295 n. 4 (quoting *United States v. Rahseparian*, 231 F.3d 1257, 1264 (10th Cir.2000)).

Appendix C

LAW REGARDING ALTERNATE THEORIES

An indictment is duplicitous if it conjunctively charges two or more offenses in the same count. *See United States v. Haber*, 251 F.3d 881, 888 (10th Cir.2001). Where an indictment is duplicitous, the accused may request that a special verdict form, or "an augmented instruction requiring unanimity on one or the other of the acts charged within a count," be used so as to ensure unanimity. *United States v. Trammell*, 133 F.3d 1343, 1354-55 (10th Cir.1998). A defendant's failure to timely challenge his indictment on duplicity grounds, however, waives any later challenge based on a failure to use a special verdict form. *See United States v. Haber*, 251 F.3d at 888-89. Accordingly, "[w]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Griffin v. United States*, 502 U.S. 46, 56-57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991).

Charging a single offense involving a multitude of alternative methods and/or courses of action, however, does not necessarily render a charge duplicitous. *See United States v. Wiles*, 102 F.3d 1043, 1062 (10th Cir.1996); Fed.R.Crim.P. 7(c)(1) ("A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means."). Still, courts recognize that, this situation, in the absence of a special verdict, presents the danger that a defendant may be convicted without the jury unanimously agreeing on the

particular acts that constitute the basis of the offense in violation of the Sixth Amendment. *See United States v. Jaynes*, 75 F.3d 1493, 1502 n. 7 (10th Cir.1996); *United States v. Fredette*, 315 F.3d 1235, 1242 (10th Cir.2003)(acknowledging the Sixth Amendment requires unanimity to convict a defendant in a federal jury trial); *United States v. Linn*, 31 F.3d 987, 991 (10th Cir.1994)(same)(citing *Johnson v. Louisiana*, 406 U.S. 356, 369, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)(Powell, J., concurring)). Nevertheless, in the Tenth Circuit, a lack of a special verdict or particularized instruction does not undermine a guilty verdict, because "a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States v. Sasser*, 971 F.2d 470, 477 (10th Cir.1992).

THE HOBBS ACT

The Hobbs Act makes conduct unlawful which "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The essence of a Hobbs Act violation is the wrongful means that a defendant employs to obtain the property

in question, *i.e.* "a lawful right to property or lawful authority to obtain property is not a defense to extortion; rather, if an official obtains property that he has lawful authority to obtain, but does so in a wrongful manner, his conduct constitutes extortion under the Hobbs Act." *Robbins v. Wilkie*, 433 F.3d 755, 769 (10th Cir.2006). On the other hand, government officials acting zealously within their statutory powers do not violate the Hobbs Act merely because the results of their actions are adverse to a particular entity or business activity. *See id.* at 769-70; *Sinclair v. Hawke*, 314 F.3d 934, 943-44 (8th Cir.2003)(noting "bank regulators do not become racketeers by acting like aggressive regulators"). Liability attaches only when a public official "obtains a 'payment to which he was not entitled, knowing the payment was made in return for official acts.' " *United States v. Kelley*, 461 F.3d 817, 826 (6th Cir.2006)(quoting *Evans v. United States*, 504 U.S. 255, 268, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992)).

With regard to fear of economic loss, specifically, federal courts have acknowledged that this fear plays a legitimate role in many economic transactions.

> [F]ear of economic loss plays a role in many business transactions that are entirely legitimate; awareness of that fear and use of it as leverage in bargaining, in which each side offers the other property, services, or rights it legitimately owns or controls, is not made unlawful by the Hobbs Act. What the Act reaches is not mere hard bargaining but the

> exploitation of the fear of economic loss in order to obtain property to which the exploiter is not entitled.

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc., 140 F.3d 494, 523-24 (3d Cir.1998)(quoting *United States v. Capo*, 791 F.2d 1054, 1062 (2d Cir.1986)(" *Capo I*"), *vacated in part on other grounds*, 817 F.2d 947 (2d Cir.1987)). Finally, "economic loss" under the Hobbs Act is not limited to the loss of tangible property or existing relationships, "but may be no more than the [victim's] right to make his business decisions free of threats and coercion, or other intangible rights." *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir.1986). *See United States v. Kelley*, 461 F.3d at 826 ("Under the 'fear of economic harm' theory, the defendant receives payment from the victim because the victim believes that the defendant can exercise his or her power to the victim's economic detriment."); *Capo I*, 791 F.2d at 1062 (stating that concept of economic loss encompasses a lost opportunity to enter into a business relationship).

ANALYSIS

Vigil states that, to have violated the Hobbs Act, he must have: (i) wrongfully attempted (ii) to obtain property from Everage (iii) with Everage's consent (iv) by wrongful use of actual or threatened fear or under color of official right. *See* Motion to Acquit at 4. Vigil argues that, even when all the evidence presented at trial is considered in the light most favorable to the government, as the Court must, the facts of this case

related to the NMSTO's attempt to engage in securities lending do not constitute a violation of the Hobbs Act. *See id.* at 2. Specifically, Vigil argues that he did not employ wrongful methods in his negotiations with Everage, *see id.* at 6, and that Everage never acquired a property interest from which to extort, *see id.* at 7. In addition, Vigil also argues, apparently in the alternative that, if the factual evidence does constitute a Hobbs Act violation, the United States did not prove that Vigil's conduct affected interstate commerce, as the Act requires, *see id.* at 13, and that conviction on the charges contained in Count Twenty-Four offends due process, because "[t]he Hobbs Act does not give fair warning that the facts of this particular count would violate its terms," *id.* at 15.

The United States contests each of Vigil's legal and factual arguments. First, the United States counters that Vigil's conduct was wrongful because Vigil had no lawful claim to the property that he demanded Everage pay to Sais. *See* United States' Response to Defendant's Motion to Set Aside Verdict and for Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 or in the Alternative for a New Trial on Count 24 at 9, filed October 19, 2006 (Doc. 413) ("United States Response"). Second, the United States asserts that Everage had acquired a property interest in the proceeds Everage expected the SLOM position to generate, in the right to compete for government contracts on a level playing field, and in the right to conduct his business affairs free of coercion, and that to sustain a conviction under the Hobbs Act,

"a victim need only fear that he or she may suffer an economic loss if the demands of the corrupt public official are not met." *Id.* at 18. Third, the United States contends that it proved that Vigil's conduct affected interstate commerce—pointing out that "[s]ecurities lending involves, by its very nature, transactions based upon securities, which are themselves instrumentalities of interstate commerce." *Id.* at 20. Finally, the United States maintains that the facts of this case fall squarely within the scope of conduct the Hobbs Act prohibits and that the Hobbs Act provides adequate warning that the conduct in which Vigil engaged was illegal. *See id.* at 21.

In addition to its legal and factual arguments, the United States alleges that Vigil has previously raised, and that the Court has previously rejected, each of the arguments Vigil raises in this motion. The Court acknowledges that each of the arguments was raised in some form at the conclusion of Vigil's first and second trials. *See* Defendant Robert Vigil's Motion to Dismiss Racketeering Acts Five Through Twenty-Six and Counts Seven Through Twenty-Eight of the Fourth Superceding Indictment Under Fed.R.Evid. 29 at 7-9, filed May 10, 2006 (Doc. 196); Defendant Robert Vigil's Reply in Support of Motion to Dismiss Racketeering Acts Five Through Twenty-Six and Counts Seven Through Twenty-Eight of the Fourth Superseding Indictment Under Fed.R.Evid. 29 at 2-7, filed June 21, 2006 (Doc. 239); Transcript of Trial at 137:1-140:18 (Bowles)(taken September 28, 2006). On August 7, 2006, the Court issued a Memorandum Opinion denying Vigil's request to dismiss the attempted extortion charge in

the face of arguments substantially similar to the ones Vigil presents in support of this motion. *See* Memorandum Opinion at 19-26, filed August 7, 2006 (Doc. 268). At the December 1, 2006 hearing on this motion, Vigil's counsel did not contend that any of his arguments in support of this motion were entirely new, but maintained that, in the face of additional evidence and more precise presentation, they are now more fully developed. *See* Transcript of Hearing at 115:12-116:12 (Bowles) (taken December 1, 2006) ("Hearing Transcript").

In any case, the Court has carefully reviewed each argument in the context of the fully developed trial record and has continued to study additional law, and finds that a reasonable jury could conclude the evidence presented at trial constitutes a violation of the Hobbs Act as a matter of law. In addition, the Court finds that there is sufficient evidence in the record for a reasonable jury to conclude that securities lending involves interstate commerce. Finally, the Court finds that sustaining Vigil's conviction will not offend due process. The Court will deny Vigil's motion.

Appendix C

I. THE JURY'S VERDICT IS NOT LEGALLY AMBIGUOUS REGARDING THE THEORY UPON WHICH THE JURY PREMISED VIGIL'S CONVICTION, AND THE EVIDENCE IS SUFFICIENT TO SUSTAIN HIS CONVICTION.

Vigil states that the United States charged two alternate theories of extortion in Count Twenty-Four: "by threat of economic harm and under color of official right." Motion to Acquit at 10. Vigil suggests that, because no special interrogatories were used to determine which theory the jury premised its conviction, if there is insufficient evidence for either one of these theories, the verdict is ambiguous, and the Court must award Vigil a new trial. *See id.* (citing *United States v. Garcia*, 907 F.2d 380, 381 (2d Cir.1990)). Vigil maintains that the evidence was insufficient for the jury to reach a guilty verdict under either theory. *See id.*

The United States agrees with Vigil that Count Twenty-Four charges attempted extortion through two alternative methods—by use and threat of economic harm and through actions under color of official right—and acknowledges that no special verdict was employed to determine which theory the jury used to reach its conclusion. *See* United States' Response at 7. The United States counters, however, that in cases where a special verdict is not used, "a general verdict stands if the evidence is sufficient as to any one of the alternate theories of prosecution," and that Vigil's failure to make a timely challenge to his indictment on duplicity grounds waives a current challenge to the failure to use a special verdict. *Id.*

The Court finds that the jury was properly charged as to the elements of a Hobbs Act violation and was entitled to return a verdict on either or both of the alternate theories presented. The Court also believes that, by failing to make a timely request for a special verdict regarding which theory the jury was premising its conviction, Vigil has waived his right to contest the ambiguity of the general verdict that the jury returned. Finally, the Court concludes that the use of a special verdict was not necessary because the evidence was sufficient to find Vigil guilty under either theory the government presented.

A. THE JURY WAS ENTITLED TO FIND VIGIL GUILTY ON ANY OF THE ALTERNATIVE ELEMENTS OF A HOBBS ACT VIOLATION DESPITE COUNT TWENTY-FOUR'S CONJUNCTIVE PHRASING.

The Court begins its analysis by noting that the Hobbs Act's definition of "extortion" is written in the disjunctive—encompassing the taking of property "by wrongful use of actual or threatened force, violence, or fear, *or* under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). This language appears to support the parties' contention that Count Twenty-Four charges extortion by alternate means. The Court notes, however, that Count Twenty-Four of the United States' Fifth Superceding Indictment, unlike 18 U.S.C. § 1951(b)(2), is worded in the conjunctive. Paragraph two of Count Twenty-Four charges that Vigil attempted

to cause Everage to provide money to Sais "by wrongful use and threat of use of economic harm *and* under color of official right." Fifth Superceding Indictment, Count Twenty-Four ¶ 2, at 31, filed July 25, 2006 (Doc. 259)(emphasis added).

Unlike the language of the Indictment, the Court's jury instructions related to Count Twenty-Four tracked the language of the statute and charged the jury that they could find Vigil attempted to extort Everage "either (a) by wrongful use of actual or threatened fear, or (b) under color of official right." Court's Final Jury Instructions with Citations, Instruction No. 31, at 68, filed September 28, 2006 (Doc. 394) ("Jury Instructions"). On the other hand, the verdict form presented to the jury required that the jury find Vigil guilty or not guilty "as charged in Count Twenty-Four of the indictment." Verdict at 5, filed September 30, 2006 (Doc. 408).

Because Vigil focuses on the alternate methods through which a defendant may violate the Hobbs Act, he does not argue, and the Court does not believe, that these inconsistencies undermine Vigil's conviction. The Tenth Circuit has described it as "hornbook law that a crime denounced in the statute disjunctively may be alleged in an indictment in the conjunctive, and thereafter proven in the disjunctive." *United States v. Powell*, 226 F.3d 1181, 1192 (10th Cir.2000)(quoting *United States v. Gunter*, 546 F.2d 861, 868-69 (10th Cir.1976)). *See United States v. Lott*, 310 F.3d 1231, 1246 (10th Cir.2002)(reviewing the sufficiency of evidence to

see if either alternate theory would have supported a conviction in a case in which the indictment was worded in the conjunctive and the charging statute was worded in the disjunctive). Other Circuit Courts of Appeals that have considered this issue are in accord. *See United States v. Coriaty*, 300 F.3d 244, 250 (2d Cir.2002) ("The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged.") (quoting *Turner v. United States*, 396 U.S. 398, 420, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970)); *United States v. Arlt*, 15 Fed.Appx. 431, 436 (9th Cir.2001)(indicating that the district court's jury instructions "property tracked the language of the statute" and holding "[a] jury may convict on a finding of any of the elements of a disjunctively defined offense, despite the grand jury's choice of conjunctive language in the indictment"); *United States v. Poarch*, 878 F.2d 1355, 1358 (11th Cir.1989) (stating that, when a criminal statute provided for alternate means of violation, and the grand jury returned an indictment with conjunctive language, "the government obtained a more difficult indictment that it was required to by the statute," and "the government need only show that one of those acts was committed in order to prove guilt"). Thus, that the jury may have found Vigil guilty based on one alternative theory, when the United States charged in the conjunctive, does not violate Vigil's Sixth Amendment right to unanimity.

The Court acknowledges that the verdict form that the jury filled out directed the jury to find Vigil guilty

or not guilty "as charged in Count Twenty-Four of the indictment." Verdict at 5. The Court assumes, however, that the jury was cognizant of and followed the jury instructions. *See Reed v. Landstar Ligon, Inc.*, 314 F.3d 447, 454 (10th Cir.2002)("We presume the jury followed the district court's instructions."). In any case, for three reasons, the Court does not believe that the direction contained in the verdict form changes its result. *Cf. United States v. Brown*, 330 F.3d 1073, 1077 (8th Cir.2003)(stating that "we are aware of no case in which a verdict form by itself was held to constitute a constructive amendment" to an indictment).

First, the Court instructed the jury that the Fifth Superceding Indictment was only the formal charge against Vigil and was not evidence of his guilt. *See* Jury Instructions, Instruction No. 19, at 23. Second, because of the indictment's length, the Court did not read it to the jury, nor absolutely require that the jury read the indictment. *See id.* Rather, the Court's instruction stated: "I urge each of you to carefully read the Indictment as you begin your deliberations in this case." *Id.* Third, and most important, if the jury followed the verdict form to the letter, disregarding the Court's alternative phrasing in Instruction No. 31 and analyzing Count Twenty-Four's elements conjunctively, a presumption the Court declines to reach, the verdict certainly is not ambiguous. Under that scenario, the jury would have found Vigil guilty of attempted extortion because he threatened Everage with economic harm *and* because he acted under color of official right. And, as the Court concludes herein, the evidence is sufficient to

sustain the verdict under both theories. *See* discussion *infra* Part I.C.

B. THE LACK OF A SPECIAL VERDICT DOES NOT INVALIDATE VIGIL'S GENERAL VERDICT ON GROUNDS OF AMBIGUITY.

Vigil points out that no special interrogatories were submitted to the jury to establish under which theory it found Vigil guilty, and "[c]onsequently[,] if there was insufficient evidence for one of these theories, then the verdict is ambiguous and a new trial must be granted." Motion to Acquit at 10 (quoting *United States v. Garcia*, 907 F.2d at 381). The United States' counters that, because Vigil failed to make a timely request for a special verdict, he may not now challenge his indictment on duplicity grounds or question the unanimity of the jury's verdict with respect to either of the alternative theories presented. *See* United States' Response at 7-8. The United States further contends that Vigil's citation of *United States v. Garcia* cannot withstand judicial scrutiny, because the Supreme Court, in *Griffin v. United States*, has "expressly disapproved" of the United States Court of Appeals for the Second Circuit's holding in *United States v. Garcia*. *See* United States' Response at 8 (citing *Griffin v. United States*, 502 U.S. at 57-58 n. 2, 112 S.Ct. 466).

The Court notes that *United States v. Garcia*, although a persuasive appellate authority, is not binding precedent for courts in the Tenth Circuit. The Court also agrees with the United States that the Supreme

Court's decision in *Griffin v. United States* casts doubt on the validity of the Second Circuit's essential holding in *United States v. Garcia.* Indeed, the Second Circuit has acknowledged that *Griffin v. United States* "effectively overruled" its decision in *United States v. Garcia. United States v. Mulder*, 273 F.3d 91, 115 (2d Cir.2001). Finally, at the hearing on this motion, Vigil's counsel acknowledged that the Supreme Court had overruled *United States v. Garcia* to the extent that the Second Circuit's result invalidated a general verdict even when the evidence was sufficient to support a conviction premised on either alternative ground. *See* Hearing Transcript at 37:15-18 (Bowles).

The petitioner in *Griffin v. United States*, Diane Griffin, along with two co-conspirators, was charged with conspiracy to defraud the federal government in violation of 18 U.S.C. § 371. *See* 502 U.S. at 47, 112 S.Ct. 466. The conspiracy was alleged to have two objects: (i) impairing the IRS' efforts to calculate income taxes; and (ii) impairing the Drug Enforcement Administration's ("DEA") efforts to ascertain forfeitable assets. *See id.* At trial, evidence was presented connecting Griffins' co-conspirators to both objects and implicating Griffin in the IRS scheme, but no evidence was presented connecting her to the DEA object. *See id.* at 47-48, 112 S.Ct. 466. The district court denied Griffin's request for severance and special interrogatories, and charged the jury with an instruction that allowed it to convict Griffin if it found the evidence sufficient to connect her to either one of the conspiracy's alleged objects. *See id.* at 48, 112 S.Ct.

466. The jury returned a general guilty verdict against all three conspirators. *See id.*

In affirming Griffin's conviction, the Supreme Court characterized it as well settled law that "a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49, 112 S.Ct. 466. Moreover, as a matter of historical practice, this rule applied to "general verdicts returned on multicount indictments where some of the counts were unsupported by the evidence . . . [and to] a general jury verdict under a *single* count charging the commission of an offense by two or more means." *Id.* at 50, 112 S.Ct. 466 (internal citations omitted)(emphasis in original). Acknowledging case law that had invalidated convictions involving general verdicts when one of the alternate grounds for conviction was unconstitutional, or otherwise illegal, the Supreme Court expressly refused to expand that jurisprudence to encompass cases where one of the alternate grounds was "merely unsupported by sufficient evidence." *Id.* at 56, 112 S.Ct. 466. Rather, the Supreme Court reaffirmed the traditional rule that, "[w]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 56-57, 112 S.Ct. 466.

Vigil has not alleged, and the Court does not believe, that either alternate ground upon which his conviction

may have been premised is unconstitutional, or otherwise illegal. Nor did he request the Court use special interrogatories to ascertain the precise basis for his guilt. Accordingly, consistent with the Supreme Court's ruling in *Griffin v. United States*, the lack of a special verdict does not make Vigil's conviction ambiguous, and the conviction must be sustained if the evidence is sufficient with respect to either of the acts charged.

The Court's holding is also consistent with Tenth Circuit caselaw since *Griffin v. United States*. In *United States v. Haber*, the defendant challenged his conviction because the district court's jury instructions permitted the jury to find him guilty of mail fraud "based upon *either* a scheme to defraud *or* a scheme to obtain money by false pretenses." 251 F.3d at 888 (emphasis in original). Unlike Vigil, the defendant in *United States v. Haber* had requested a jury instruction explaining that the jury must unanimously agree as to the specific basis for conviction, but the district court refused "because the jury instructions already included a general exhortation that the verdict must be unanimous in order to convict." *Id.* Citing *Griffin v. United States* as support for its holding, the Tenth Circuit in *United States v. Haber* recognized that, "[i]n some circumstances, 'a defendant can raise a late challenge to a duplicitous indictment if cause is shown that might justify the granting of relief from the waiver,' " but found no such circumstances applied in that case. *United States v. Haber*, 251 F.3d at 889 (quoting *United States v. Trammell*, 133 F.3d at 1354).

Appendix C

The Court finds the Tenth Circuit's holding in *United States v. Haber* instructive. Like the mail fraud charge against the defendant in *United States v. Haber*, Count Twenty-Four charges Vigil with one substantive crime provable under alternate methods of completion. Like the district court in *United States v. Haber*, the Court provided the jury with a general exhortation that to reach a verdict, it must reach a unanimous agreement on each count of the indictment. *See United States v. Sasser*, 971 F.2d at 477 ("[A] general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict."); Jury Instructions, Instruction No. 39, at 79. Finally, the Tenth Circuit in *United States v. Haber* drew support for its result on its conclusion that the United States had presented sufficient evidence to establish both alternative offenses of a scheme to defraud and a scheme to obtain money by false pretenses. *See* 251 F.3d at 889. Similarly, the Court believes that the evidence presented at Vigil's trial was sufficient for a reasonable jury to find him guilty beyond a reasonable doubt under both theories the United States' posited. *See* discussion *infra* Part I.C.

Appendix C

C. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE JURY TO REACH A CONVICTION BASED ON EITHER ALTERNATE THEORY.

Vigil contends that the evidence the United States presented was insufficient to constitute a violation of the Hobbs Act under both the threat-of-economic-harm and under-color-of-official right theories. *See* Motion to Acquit at 10. In support of his conclusion, Vigil cites the Second Circuit's decision in *United States v. Garcia* for the proposition that "when a 'victim' is a willing participant in order to materially benefit from some alleged extortion, the 'victim' is not acting out of fear, but rather out of a desire to improve its bottom line." Motion to Acquit at 11. Because the Court believes that the facts of this case are distinguishable from those in *United States v. Garcia*, and because the Court believes that, consistent with more recent federal appellate precedent, the evidence was sufficient for a reasonable jury to find that Vigil threatened Everage with economic harm and acted under color of official right, the Court disagrees with Vigil and finds that there was sufficient evidence to sustain his conviction.

1. *"Wrongful" Conduct.*

Vigil states that "[t]he core of the Hobbs Act that separates lawful from unlawful conduct is that the alleged act of extortion must be 'wrongful.' " Motion to Acquit at 5. Because Congress has not expressly defined "wrongful" in 18 U.S.C. § 1951, Vigil cites the Anti-

Racketeering Act of 1934 for the proposition that " 'wrongful' means in violation of the criminal laws of the United States or of any State or Territory," Motion to Acquit at 5 (quoting 48 Stat. 979, 980), and *Black's Law Dictionary* as defining "wrongful" as "contrary to law." Motion to Acquit at 5 (citing *Black's Law Dictionary* 1606 (7th ed.1999)). Vigil does not cite, however, any authority indicating that Congress intended either of these definitions to apply to the term "wrongful" under the Hobbs Act. Indeed, at the hearing on this motion, Vigil's counsel seemed to distance himself from this assertion and stated that, "to be wrongful, [a defendant has] to obtain something to which [he's] not entitled." Hearing Transcript at 18:21-23 (Bowles).

Vigil's counsel's statement is consistent with the Supreme Court's conclusion in *United States v. Enmons*, 410 U.S. 396, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973), that " 'wrongful' has meaning in the [Hobbs] Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." 410 U.S. at 400, 93 S.Ct. 1007. Nevertheless, in his memorandum in support of this motion, Vigil combines, without explication, the definitions he cites with the Supreme Court's language in *United States v. Enmons* and concludes that "to be 'wrongful' the act attempted or carried out must be in violation of the criminal laws of the United States or a State and the alleged extortionist must have no lawful claim to the 'property' at issue." Motion to Acquit at 5.

The United States disputes Vigil's interpretation of the meaning of "wrongful" and argues that the Hobbs Act's legislative history "makes clear that Congress intended the Hobbs Act to have a broader scope than the Anti-Racketeering Act of 1934." United States' Response at 11. The United States cites to *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 123 S.Ct. 1057, 154 L.Ed.2d 991 (2003) (" *Scheidler II*"), and *Evans v. United States*, as cases in which the Supreme Court acknowledged that Congress passed the Hobbs Act because of its dissatisfaction with the Supreme Court's restrictive construction of the activities that were criminal under the Anti-Racketeering Act of 1934. *See* Motion to Acquit at 11; *Scheidler II*, 537 U.S. at 407, 123 S.Ct. 1057 (noting that the "Hobbs Act was subsequently enacted to supercede the Anti-Racketeering Act and reverse the result in [*United States v. Local 807 of Int'l Bhd. of Teamsters*, 315 U.S. 521, 62 S.Ct. 642, 86 L.Ed. 1004 (1942)]"); *Evans v. United States*, 504 U.S. at 262, 112 S.Ct. 1881 ("[The Hobbs Act] was intended to encompass the conduct held to be beyond the reach of the [Anti-Racketeering Act of 1934] by our decision in *United States v. Teamsters.*").

The Court finds the United States' argument persuasive and believes that, to the extent that Vigil continues to argue that a defendant's actions must be contrary to federal or state law to constitute a violation of the Hobbs Act, he has misunderstood the law. Rather, the Court understands the term wrongful to apply to scenarios where a defendant employs, or attempts to employ, one of the extortion methods enumerated in

18 U.S.C. § 1951(b)(2) and has no lawful claim to the property that is the subject of the extortion (or, in the case of an attempt, the attempted extortion).

Perhaps because Vigil's motion does not argue that the evidence at trial was insufficient to find him guilty of extortion based on the "under-color-of-official right" theory, *see* discussion *infra* Part I.C.3, both Vigil and the United States appear to limit the application of their "wrongful" conduct arguments to the "fear-of-economic-harm" theory. The United States cites *United States v. Enmons* for the proposition that " 'wrongful' does not appear to apply to the 'under color of official right' portion of the definition." United States' Response at 9 (citing *United States v. Enmons*, 410 U.S. at 399, 93 S.Ct. 1007). The Supreme Court in *United States v. Enmons* appears to limit its analysis regarding the meaning of "wrongful" to the first subset of methods in which the Hobbs Act can be violated—"actual or threatened force, violence, or fear." *See* 410 U.S. at 399, 93 S.Ct. 1007; 18 U.S.C. § 1951(b)(2). Nevertheless, because the Supreme Court has more recently stated that a public official is guilty of extortion pursuant to the under-color-of-official-right theory when that "public official has obtained a payment to which he was not entitled," the Court believes the distinction is immaterial. *Evans v. United States*, 504 U.S. at 268, 112 S.Ct. 1881. The Court concludes that the term "wrongful" applies when a defendant attempts to extort property to which he has no lawful claim—irrespective of the extortion method employed—and, because Vigil's claim to the property interests in this case are identical

under either theory on which the jury may have premised his conviction, the jury was entitled to consider his conduct "wrongful."[2]

As a supplemental argument, Vigil contends that his actions are not wrongful, because they cannot be characterized as anything more than "hard bargaining"—activity that the Hobbs Act does not criminalize. *See* Motion to Acquit at 6 (citing *Capo I*, 791 F.2d at 1062-63).[3] Vigil asserts that, as State

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2. The Court notes that its instructions to the jury were consistent with this finding. With regard to the "fear of economic loss or harm" theory, the Court instructed the jury that " '[w]rongful' means that Mr. Vigil had no lawful right to obtain the property in that way." Jury Instructions, Instruction No. 31, at 68. With regard to the "under color of official right" theory, the Court instructed the jury that "[t]o 'wrongfully obtain property under color of official right' means the taking or attempted taking by a public officer of property not belonging or owed to him or his office, whether or not the public official employed fear." *Id.*, Instruction No. 31, at 69-70. The Court's definitions substantially track the Tenth Circuit's Criminal Pattern Jury Instructions 2.70 and 2.71. *See* Tenth Circuit Criminal Pattern Jury Instruction 2.70, Extortion by Force Violence or Fear, at 230 (2005); Tenth Circuit Criminal Pattern Jury Instruction 2.71, Extortion Under Color of Official Right, at 232 (2005). Neither party made an objection to these instructions.

3. The United States criticizes Vigil's citation of *Capo I*, noting that the Second Circuit, sitting *en banc*, reversed the convictions that *Capo I* upheld. *See United States v. Capo*, 817 F.2d 947 (2d Cir.1987) (en banc) (" *Capo II* "). The Second Circuit

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Treasurer, he had the authority to decide whether, and on what terms, to create the SLOM position, and that he was entitled to create the position in the manner he felt would be most advantageous to the NMSTO; he argues that those terms do not become criminal because Everage did not agree to them. *See* Motion to Acquit at 6-7. Vigil argues that, as State Treasurer, "he had every lawful right to suggest modifications of the terms of the contract or to ask Mr. Everage to work out a compensation arrangement with another employee." *Id.* at 6. To the extent that Vigil's proposed terms might have violated the provision against subcontracting contained in the RFP, Vigil concedes that such terms may have been grounds for a breach of contract action, but he asserts they were in no way criminal. *See id.*

The United States characterizes this argument as "inapposite" and counters that Vigil's actions remain "wrongful" because he had no lawful claim to the

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in *Capo II* did not hold that hard bargaining was criminal, however, to the contrary, it reversed the defendants' Hobbs Act convictions—upheld in *Capo I*—because it found the evidence was insufficient to demonstrate that the victims had any fear of economic loss. *See Capo II*, 817 F.2d at 954. In any case, more recent federal appellate cases continue to recognize that the Hobbs Act does not prohibit "hard bargaining." *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d at 523-24 ("What the Act reaches is not mere hard bargaining but the exploitation of the fear of economic loss in order to obtain property to which the exploiter is not entitled.").

property for which he was bargaining. *See* United States' Response at 13. The United States contends that "[t]he only legitimate bargaining in which [Vigil] could have engaged would have been on behalf of the people of New Mexico, not on behalf of the wife of his criminal associate[,] Michael Montoya." *Id.* The United States explains that, had Vigil "attempted to bargain down Everage's overall level of compensation, with the benefits running to the State of New Mexico, [Vigil's] argument might have been persuasive." *Id.*

There is sufficient evidence in the trial record for a reasonable jury to find beyond a reasonable doubt that Vigil was not concerned with negotiating the fee structure, or the mechanism through which the SLOM was paid, to limit the NMSTO's costs associated with securities lending. Indeed, the evidence was limited to his attempt to shift a portion of the fees securities lending generated—in whatever amount they may have resulted–to Sais. Moreover, at this point in the proceedings, the Court must evaluate the evidence in the light most favorable to the United States. Irrespective of Vigil's theory at trial, the Court believes that the jury was free to disregard Vigil's "hard bargaining" analysis and conclude that his actions were an attempt to extort from Everage some portion of the fees that he would have earned through his performance of the SLOM contract. Because Vigil would not have a lawful claim in any monies Everage earned in this manner, the Court finds that the evidence was sufficient for a reasonable jury to find beyond a reasonable doubt that Vigil's conduct was wrongful.

2. *Threat of Economic Harm.*

The defendants in *United States v. Garcia*, Robert Garcia, a Congressman from New York City, and his wife, Jane Garcia, were accused of engaging in two allegedly extortionate acts involving threat of economic harm. First, at a dinner with Mario Moreno, an officer at the Wedtech Corporation, the Garcias were alleged to have made references to Robert Garcia's influence in Congress as well as to the couple's access to top officials at the United States Navy and United States Postal Service. *See* 907 F.2d at 383. The Garcias were aware that Wedtech was having problems performing under a multimillion dollar contract to build pontoon boats for the Navy, and that the company was attempting to obtain postal contracts. *See id.* During the dinner, Robert Garcia suggested to Moreno that Wedtech hire Jane Garcia as a public relations consultant; when he refused—because he "had no need for a public relations consultant"—Jane Garcia persisted and suggested that she could be paid through an intermediary friend of the Garcias. *Id.* Subsequent to this dinner conversation, Moreno sought and received the approval of such a payment from the Wedtech officers. *See id.*

The second extortionate act involved a $20,000.00 loan Moreno arranged from the Wedtech "slush fund" to the Garcias. *Id.* at 384. Moreno testified at trial that it was his understanding this loan was necessary for Wedtech to continue receiving Robert Garcia's assistance. *See id.* Before repaying the loan—approximately five months late—Robert Garcia asked

Moreno to convert the loan into a donation to his sister's church; Moreno declined, but indicated that he might make a donation to the church at a later time. *See id.*

The Second Circuit in *United States v. Garcia* declined to characterize either one of these transactions as extortion by wrongful use of economic fear. In reaching this finding, the Second Circuit relied on its earlier ruling in *United States v. Capo*, 817 F.2d 947 (2d Cir.1987) (en banc) (*"Capo II"*), a case that involved a job-selling scheme at the Eastman Kodak Company ("Kodak"). *See* 817 F.2d at 948. In the wake of an announcement that Kodak had an urgent need for additional employees, the defendants in *Capo II* allegedly used their influence with a hiring official at Kodak to secure preferential hiring treatment for individuals who made payments to the defendants. *See id.* at 949. The Second Circuit acknowledged that the defendants' conduct may have constituted bribery, but held that, as a matter of law, it could not be considered extortion, because there was "no evidence . . . that the 'victims' were coerced or threatened by [the] defendants, and all the evidence points to the conclusion that they paid voluntarily to improve their chances to get jobs they had not been able to obtain on their own." *Id.* at 954.

Consistent with its opinion in *Capo II*, the Second Circuit in *United States v. Garcia* pointed to evidence that, during the dinner at which Moreno and the Garcias discussed Wedtech's contract with the Navy and potential contracts with the Postal Service, Moreno did

not perceive the Garcias' comments as threatening and, to the contrary, postulated that the Garcias could be influential allies. *See id.* at 383. The Second Circuit in *United States v. Garcia* characterized Wedtech's actions as buying influence—as opposed to capitulating to extortionate demands—and noted that, "even in the face of Garcia's disgraceful request for money, Wedtech was not risking the loss of anything to which it was legally entitled." *Id.* at 383-84. Moreno's refusal to convert the $20,000.00 loan into a donation affirmed the Second Circuit's conviction, because "[h]ad Garcia actually established a climate of fear . . . Wedtech would not have refused Robert Garcia's request that Wedtech convert its loan into a 'donation.' " *Id.* at 384.

Disregarding the possibility that *United States v. Garcia* is no longer good law, the Court believes the important distinction between the payments the "victims" made to the defendants in *Capo II*, the payments Wedtech made to Garcia in *United States v. Garcia*, and the extortionate demands Vigil made of Everage is the victim's right to the property extorted. In finding that the Garcias' conduct did not violate the Hobbs Act, the Second Circuit in *United States v. Garcia* stated that what the evidence at trial proved was that "Wedtech paid the Garcias in the hope of receiving future favors, it did not establish that the company acted out of fear that without these payments it would lose existing contracts or even opportunities to which it was legally entitled." 907 F.2d at 385. The Second Circuit reasoned that Wedtech paid the Garcia's out of its desire for preferential treatment, and not from fear of losing something to which it had a legal claim. *See id.* at 384.

The United States contends that *United States v. Garcia* is also distinguishable because, unlike Wedtech and the Garcias, the evidence presented at Vigil's trial suggested that Everage did not act complicity with Vigil. The United States notes that Everage repeatedly opposed hiring Sais. *See* Hearing Transcript at 73:7-10; 76:11-12 (Yarbrough). Everage indicated that he met with Sais on April 29, 2005 to discuss her professional qualifications, and that, based on that meeting, decided that he did not wish to hire her. *See* Everage Direct Examination at 53:8-14; 59:24-60:10. Accordingly, when Everage submitted a bid for the SLOM contract, on May 3, 2005, his bid did not include any role for Sais. *See id.* at 62:12-17. Everage acknowledged that he did eventually draft a memorandum of understanding between himself and Sais, and met with Sais a second time in an attempt to negotiate a fee-sharing arrangement, but was unable to come to a satisfactory arrangement. *See id.* at 102:7-9; 105:14-18. Everage testified that, after conveying his decision to Vigil, he believed Vigil threatened to cancel his contract with the NMSTO if Everage and Sais could not resolve their disagreement. *See id.* at 111:11-12; 112:9-12; Everage Cross-Redirect at 80:4-7.

The Court finds the United States' distinction argument persuasive and believes that the facts in Vigil's case are more closely aligned to those that the United States Court of Appeals for the Sixth Circuit addressed in *United States v. Collins*, 78 F.3d 1021 (6th Cir.1996). In *United States v. Collins*, the Sixth Circuit affirmed the conviction of Billy Louis Collins, the

husband of the governor of Kentucky, who had been convicted of conspiracy to violate the Hobbs Act. During an eight-week trial, the United States had presented evidence that Collins and his co-conspirators solicited contributions from private parties and businesses, for personal and political causes, in exchange for the right to contend for state contracts, including bond-underwriting contracts. *See id.* at 1026. In addition to general evidence demonstrating a scheme based on payments for access to government business—the primary investment bank involved in the scandal had never previously done business as a bond underwriter with Kentucky—the "evidence of awards of government contracts to contributors was balanced by evidence of the denial of contracts to those who refused to contribute." *Id.* at 1029. The Sixth Circuit in *United States v. Collins* acknowledged the Second Circuit's holding in *United States v. Garcia*, but determined that the payments that contributors made in *United States v. Collins* were not attempts to purchase influence, but rather were made "out of fear that without the payments they could lose the opportunity to compete for government contracts on a level playing field, an opportunity to which they were legally entitled." *Id.* at 1031.

Similar to the contributors in *United States v. Collins*, Everage testified that he was aware that he did not have an absolute right to the SLOM contract, but that, based on his conversation with Vigil subsequent to his first meeting with Sais, it became his understanding that, if he did not hire Sais, he would

not be *considered* for the SLOM position. *See* Everage Direct Examination at 61:8-9. Consequently, like the contributors in *United States v. Collins*, Everage was willing to direct some money to Sais—at Vigil's direction—because he felt that, if he did not, he would have no opportunity to be awarded the SLOM contract. *See* Everage Direct Examination at 82:5-7. As further reinforcement of this conclusion, Everage testified that, when he later informed Vigil, during a June 13, 2005 phone call following his second meeting with Sais, that he could not employ Sais, Vigil told him that he was having Gallegos draft a letter to cancel the SLOM contract between Everage and the NMSTO. *See id.* at 111:11-12.

The Court believes that these facts reflect more than just Everage's attempt to purchase influence; Vigil's actions were an attempt to compel Everage to part with proceeds he would have earned in the SLOM position by causing him to fear that, if he did not, he would lose his opportunity to compete in the SLOM bidding process. The SLOM was to be selected pursuant to a bidding process executed through the issuance of a RFP. *See id.* at 43:6-16. Everage, like any other investment manager that might submit a bid, had a legal entitlement to be considered on a level-playing field, and without coercion.

Appendix C

3. *Under Color of Official Right.*

Because Vigil asserts that, under *United States v. Garcia*, there was insufficient evidence for the jury to convict him under the threat-of-economic-harm theory, and that, because the jury was not presented with a special interrogatory to determine upon which premise it based its guilty verdict, his conviction is ambiguous, he does not address the applicability of the under-color-of-official-right theory. The United States argues that the evidence presented at trial was sufficient to support a guilty verdict based on the under-color-of-official-right theory. Specifically, the United States contends that Vigil attempted to obtain property, and distribute it to Sais, and that the property and corresponding right to distribute it did not belong to him and was not owed to him or his office. *See* United States' Response at 10.

A public official commits extortion "under color of official right" when that "official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. at 268, 112 S.Ct. 1881. Vigil does not dispute that he did not attempt to hire Sais as a NMSTO employee or intend to compensate her for work related to the securities-lending project with state funds. Indeed, Everage testified that he understood Vigil decided to issue a contract for the SLOM position, because the NMSTO did not have the budgetary resources to have an in-house employee devoted to securities lending. *See* Everage Direct Examination at 36:9-14. Rather, the SLOM was to be paid a fee

calculated as a percentage of the value of securities that the NMSTO lent. *See* Everage Cross-Redirect at 35:17-23.

The Court agrees with the United States that these fees, once they were earned pursuant to work performed consistent with the terms of the SLOM contract as described in the RFP, would have been private property belonging to the SLOM. Neither Vigil, nor the NMSTO, would have had any entitlement to these funds or right to control their distribution. Conditioning the award of the SLOM contract—an official act—on a targeted distribution of some or all of these fees constitutes a violation of the Hobbs Act.

II. VIGIL ATTEMPTED TO EXTORT PROPERTY FROM EVERAGE.

Vigil argues that, in addition to proving that he wrongfully attempted to obtain property from Everage, the United States was obligated to prove that Everage had obtained a property interest that Vigil could direct towards Sais. Vigil asserts that Everage never acquired more than "theoretical monies" and that such monies do not constitute property that can be extorted under the Hobbs Act. Motion to Acquit at 7. *See* Hearing Transcript at 19:10-11 (Bowles). Vigil points out that the SLOM position was not funded and asserts that no property interest could manifest until the NMSTO contracted with securities-lending agents to engage in securities lending—a step that was never taken. *See* Motion to Acquit at 8. Vigil contends that, because

Everage had no entitlement to payment, even under a signed contract for the SLOM position, he never acquired property that Vigil could extort. *See id.* Vigil concedes that, because the conviction at issue is for an attempt crime, "[i]t is true that the United States is not required to prove that property was *actually* extorted." *Id.* at 2 (emphasis in original). He asserts, however, that the United States must prove "that there was *actually something to extort* in the first place or there is simply no crime that could be committed." *Id.* (emphasis in original).

At the hearing on this motion, Vigil emphasized his point by stating that, because there was only a possibility that the SLOM would profit from the NMSTO's participation in securities lending, and not an assurance, the SLOM contract called for a unique legal analysis. *See* Hearing Transcript at 20:3-7 (Bowles). Vigil's counsel conceded that, if the SLOM contract had been for a fixed amount of money in exchange for acting as the SLOM, and a contract between the NMSTO and the SLOM was executed, an attempt to shift some of that money to a third person would be illegal under the Hobbs Act. *See id.* at 20:7-11 (Bowles). Under the facts of this case, however, Vigil argues that no property interest could have manifested until the securities-lending agents agreed to contract with the NMSTO and fee-generating trades were actually completed. *See id.* at 27:14-22 (Bowles). Vigil maintains that, "even if legally binding, [the SLOM contract] would have created no property interest standing alone." Motion to Acquit at 2.

Appendix C

The United States counters that, although the exact amount of money that Everage was to be paid was indeterminable, both Vigil and Everage expected the SLOM to earn income and that Vigil was attempting to shift a significant portion of that income to Sais. *See* United States' Response at 15; Hearing Transcript at 48:12-15; 49:5-6 (Yarbrough). The United States emphasizes that, while the amount of money Everage stood to gain was unclear, the jury heard evidence of several specific and fixed amounts that Vigil attempted to extort for Sais.

The United States further alleges that Everage had acquired a property right in the SLOM position, because Vigil "does not dispute . . . that had Everage given in to [Vigil's] demands and agreed to pay Sais part of whatever money he received, Everage would have received the SLOM position." United States' Response at 16. The United States contends that a contractual entitlement to specific property is not a prerequisite to the manifestation of a property interest. *See* Hearing Transcript at 40:17-24; 43:4-8 (Yarbrough). The United States argues that, although intangible, Everage had a vested property right in a fair opportunity to compete for the SLOM position and in his authority to run his own business enterprise free from coercion. *See* Hearing Transcript at 49:17-21 (Yarbrough).

In addition, at the hearing on the motion, the United States argued that there was evidence that Vigil originally attempted to extort not an indefinite amount of money, but a fixed payment to Sais, regardless

whether the SLOM ever generated any commission fees. *See id.* at 44:7-13 (Yarbrough). At the trial, Everage testified that, based on the evaluation he had done, he estimated that he could expect to earn approximately $105,450.00 per year as the SLOM. *See* Everage Cross-Redirect at 12:5-8. Everage testified that, when he first inquired what he would have to pay Sais, he was told he should expect to pay her between $500.00 and $1,000.00 per month. *See* Everage Direct Examination at 37:17-21. Everage stated, however, that "the pressure and the price was going up," and that the price eventually escalated to $16,000.00 per year. *Id.* at 41:19-20. Everage next told the jury that, at his first meeting with Sais, on April 29, 2005, Sais informed him that she was expecting her compensation to be $55,000.00 per year. *See id.* at 55:12-14. Finally, evidence was presented that the memorandum of understanding that Everage drafted, but which he and Sais never endorsed, provided for Sais to receive the lesser amount of forty percent of Everage's net earnings from securities lending or $45,000.00 per year. *See* Everage Cross-Redirect at 26:18-24. The United States asserts that each of these amounts constitutes a fixed, certain property interest that Vigil attempted to extort from Everage and direct to Sais. *See* Hearing Transcript at 47:2-4 (Yarbrough).

The Court acknowledges the United States' first argument, but notes that, despite discussion of these figures, at no point did Everage and Sais ever reach an agreement on the amount Sais was to be compensated. In fact, Everage indicated that, after both meetings with Sais, he resolved not to hire her. Given the tenuous

nature of the negotiations between Sais and Everage, the Court is not convinced that a property interest, consisting of a fixed, certain amount of money, ever existed for which Vigil could extort Everage. In any case, because the Court does not believe the existence of definite, tangible property is necessary to sustain an attempted extortion conviction under the Hobbs Act, the Court need not decide that question for the purposes of this motion.

Vigil cites to *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), as support for his contention that theoretical monies do not constitute "property" for the purposes of a Hobbs Act conviction. *See* Motion to Acquit at 7. In *Cleveland v. United States*, however, the Supreme Court did not construe the Hobbs Act, but 18 U.S.C. § 1341, the mail fraud statute which proscribes use of the mail in "any scheme or artifice to defraud, or for obtaining money or property." 18 U.S.C. § 1341; *Cleveland v. United States*, 531 U.S. at 15, 121 S.Ct. 365. The defendant in *Cleveland v. United States* had been accused of fraudulently using the mail to assist in obtaining state licenses to operate video poker machines from the State of Louisiana. *See* 531 U.S. at 15-17, 121 S.Ct. 365. The Supreme Court, in a unanimous opinion authored by Justice Ginsburg, reversed the defendant's conviction and held that the mail fraud statute "does not reach fraud in obtaining a state or municipal license of the kind here involved, for such a license is not 'property' in the government regulator's hands." *Id.* at 20, 121 S.Ct. 365.

Contrary to the inference Vigil wishes the Court to draw, however, the Supreme Court did not rule that the licenses could not constitute property; rather, the Supreme Court in *Cleveland v. United States* considered the more limited question whether state licenses to operate video poker machines were property in the hands of the State. *See id.* at 20, 121 S.Ct. 365. The Supreme Court asserted that Louisiana's interests in the machines were regulatory, not property, interests. *See id.*

The United States argues that *Cleveland v. United States* is also distinguishable because that case involved licenses and the object of the attempted extortion in Vigil's case was money. *See* United States Response at 15. The United States represents that it is unaware of any case in which a court held that money is not property. *See id.* The Court finds this argument persuasive and notes that the Supreme Court seemed to make a similar distinction in *Cleveland v. United States.* In delineating the distinction between a regulatory and a property interest, the Supreme Court observed that the "the Government nowhere alleges that [the defendant] defrauded the State of any money to which the State was entitled by law . . . [and] there is no dispute that [the defendant] paid the State of Louisiana its proper share of revenue [the video poker machines generated]." 531 U.S. at 22, 121 S.Ct. 365.

In *United States v. Mitov*, 460 F.3d 901 (7th Cir.2006), the United States Court of Appeals for the Seventh Circuit recently addressed a very similar issue to the

one facing the Court. The defendant in *United States v. Mitov* was the former caretaker of a decedent whose estate was the subject of probate litigation. The caretaker had demanded payment from the attorney for the decedent's grandson in return for his testimony in a state civil suit regarding potential improprieties in the distribution of the decedent's estate. *See id.* at 903-04. On appeal after his conviction for attempted extortion, the caretaker had argued that the state civil suit was destined to fail, and therefore "any hope of success and possible economic profit was unreasonable." *Id.* at 907. The Seventh Circuit dismissed this argument, noting that the Hobbs Act does not require "a showing of certainty of success," and held that "a reasonable belief in some form of success and profit" was sufficient to sustain the defendant's conviction. *Id.*

The Court finds the Seventh Circuit's reasoning in *United States v. Mitov* persuasive, and does not believe that the uncertain magnitude of Everage's property interest invalidates its existence. The Court believes this holding is also consistent with the Sixth Circuit's recognition in *United States v. Collins* that contributors who paid for preferential treatment in government contracts stood to "lose the opportunity to compete . . . on a level playing field." 78 F.3d at 1030. Everage's reasonable belief in some form of success and profit, a belief that Vigil apparently shared judging by his request that Everage hire Sais, is sufficient to establish a property interest. The United States was not required to prove that Vigil attempted to deprive Everage of tangible property or that the property that Everage

would have lost could be quantified: the "property" element of a Hobbs Act conviction requires "no more than the [victim's] right to make his business decisions free of threats and coercion, or other intangible rights." *United States v. Lewis*, 797 F.2d 358, 364 (7th Cir.1986).

The mere existence of a property interest, however, is not sufficient to establish a Hobbs Act violation. The Supreme Court has "construed the extortion provision of the Hobbs Act . . . to require not only the deprivation but also the acquisition of property." *Scheidler II*, 537 U.S. at 404, 123 S.Ct. 1057. In other words, to be guilty of attempted extortion, it is not enough that Vigil attempted to deprive Everage of a property right; Vigil must have also attempted to "obtain" that property. *Id.* The Supreme Court in *Scheidler II* went on to hold that to "obtain" property under the Hobbs Act requires a defendant to have "pursued [ ]or received 'something of value from' [the victim] that they could exercise, transfer or sell." *Id.* at 405, 123 S.Ct. 1057 (quoting *United States v. Nardello*, 393 U.S. 286, 290, 89 S.Ct. 534, 21 L.Ed.2d 487 (1969)). *See United States v. Welch*, 327 F.3d 1081, 1108 n. 27 (10th Cir.2003)(explaining that the Supreme Court's holding in *Scheidler II*, requiring that a defendant "obtain" property to sustain an extortion conviction, distinguishes the Hobbs Act from other fraud statutes).

In *United States v. Gotti*, 459 F.3d 296 (2d Cir.2006), the Second Circuit articulated a two-pronged inquiry for determining whether the obtaining-of-property element had been met for the purposes of establishing

extortion of intangible property under the Hobbs Act. The Second Circuit identified the key inquiry as "whether the defendant is (1) alleged to have carried out (or, in the case of attempted extortion, attempted to carry out) the deprivation of a property right from another, with (2) the intent to exercise, sell, transfer, or take some other analogous action with respect to that right." *Id.* at 324. In addition, the Second Circuit provided three examples how an extortion victim's property interest might be exercised, transferred, or sold:

> These three examples illustrate various ways in which an extortion victim's property right might be exercised, transferred, or sold by an extortionist. In the first example, the victim is ordered to exercise his or her rights in accordance with the extortionist's wishes, such that the extortionist is essentially controlling the exercise of those rights. In the second example, the victim is ordered to transfer his or her rights over to the extortionist so that the extortionist can simply exercise those rights himself or herself. (A closely related variant would be where the extortionist orders the victim to transfer the rights to a third party of the extortionist's choosing.) In the third example, the victim's right is sold by the extortionist to a third party of the extortionist's choosing. The precise demarcation between an exercise and a transfer may certainly be subject to debate.

> Because the critical question is simply whether the defendant sought to exercise, transfer, or sell the rights at issue, however, we are less concerned with line-drawing between those terms than with the unifying principle for the "exercise, transfer, or sale" framework: the defendant's intent to do something affirmative with respect to the property right.

Id. at 324 n. 9. The Second Circuit in *United States v. Gotti* made use of this analytical framework to evaluate five different scenarios of alleged extortion or attempted extortion. The Court finds each of these scenarios relevant and instructive.

The first count of extortion that the Second Circuit considered in *United States v. Gotti* involved allegations that members of the Gambino Organized Crime Family of La Cosa Nostra (the "Gambino Family") exercised control over the International Longshoremen's Association ("ILA") by using force to ensure that Gambino Family associates filled various executive positions within the union and then directing the activities of those associates. *See id.* at 302. The United States charged that the defendants had deprived union members of their rights to free speech and democratic participation in union affairs, as the Labor-Management Reporting Disclosure Act, 29 U.S.C. §§ 401-531 ("LMRDA") guarantees, and their rights to loyal representation by their officers. *See id.* Although these rights were intangible and not easily quantified, the

Second Circuit found that these activities constituted a violation of the Hobbs Act, because "the government charges not only that the defendants caused the relinquishment of the union members' LMRDA rights, but also that the defendants did so in order to exercise those rights for themselves—indeed, in a way that would profit them financially." *Id.* at 325.

The second count of extortion related to certain defendants' scheme to use their control over the Management-International Longshoremen's Association Managed Health Care Trust Fund ("MILA")(the ILA's national health plan) to ensure that a particular company that a Gambino Family associate owned, and which provided kickbacks to the defendants, received MILA's lucrative pharmaceutical services contract. *See id.* at 303. The Second Circuit determined that this scheme qualified as extortion under the Hobbs Act, because "the defendants sought to obtain . . . the MILA participants' and beneficiaries' rights to have the MILA trustees contract with the service provider . . . of the trustees' choice . . . [and] that the defendants sought to exercise these rights for themselves by telling the MILA trustees which service provider to support." *Id.* at 326. According to the Second Circuit, under this scheme, "the defendants exercised the rights in question in order to profit themselves." *Id.*

The third count of extortion that the Second Circuit in *United States v. Gotti* considered involved an unsuccessful attempt by numerous defendants to force Tommy Ragucci, an employee at the Howland Hook

Container Terminal, to resign from his position so that a Gambino Family associate could assume the position. *See id.* at 311. Although Ragucci was an at-will employee, and therefore had no guarantee of future earnings of continued employment, the Second Circuit held that "he surely had the right to be employed there for as long as he sought the job and his employer would have him." *Id.* at 326. The Second Circuit reasoned that this attempt sustained an extortion conviction because the defendants' actions "sought to deprive [Ragucci] of that right, and of its attendant salary, when they [unsuccessfully] ordered him to quit . . . so that they could transfer that right . . . to a third party of their choice." *Id.* at 326.

The fourth count of extortion in *United States v. Gotti* alleged that several defendants had extorted intangible property rights from Eduard Alayev, a restaurant owner, by forcing him to keep illegal gambling machines on his restaurant premises, and, when Alayev informed the defendants that he wished to sell the restaurant, by demanding that he sell it to an associate of the defendants and at a certain price. *See id.* at 313-14. The Second Circuit recognized that this action implicated a specific intangible property right—"the right to make various business decisions . . . free from outside pressure." *Id.* at 327. Moreover, the Second Circuit noted that the defendants "essentially made themselves [Alayev's] silent partners and exercised his rights . . . in a manner that would profit them." *Id.*

Appendix C

The fifth, and final, extortion count that the Second Circuit considered in *United States v. Gotti* related to the defendants' attempts to compel Steven Seagal, the prominent film actor, to work with Jules Nasso, an associate of the defendants. In the late 1980s, Seagal had formed a film-production company with Nasso, but in the mid-1990s, severed the business relationship because Seagal felt that Nasso had undergone a personality change and determined the he no longer wished to work with Nasso. Seagal testified that, throughout the course of several meetings and communications, he felt that the defendants were implicitly threatening him with violence if he did not begin to work with Nasso again. *See id.* at 314-15. The Second Circuit employed an analysis similar to that it used in analyzing the Alayev facts, and found that "the defendants sought to exercise for themselves Seagal's right to make his own business decisions, by threatening him with possible violence unless he worked with Jules Nasso again." *Id.* at 327. In sum, the Second Circuit determined "the defendants sought to exercise for themselves Seagal's intangible right to decide with whom to work, in order to secure profit for themselves." *Id.* at 327.

The Court believes that the evidence against Vigil is analogous to each of the Counts the Second Circuit addressed in *United States v. Gotti* and that, consistent with the elements of a Hobbs Act violation that the Supreme Court articulated in *Scheidler II*, a reasonable jury could have found Vigil guilty of attempted extortion beyond a reasonable doubt. A reasonable jury could have

found that Everage had a property interest under several theories—including the right to contract with parties of Everage's choosing, the right to make business decisions free from outside pressure, and the right to decide with whom to work—and that Vigil attempted to obtain those interests with the intent of exercising those rights, or transferring them to Sais, for his own benefit. Taken in the light most favorable to the jury's verdict, the evidence was sufficient for a reasonable jury to conclude beyond a reasonable doubt that Vigil's actions constituted an attempt to violate the Hobbs Act.

III. THE EVIDENCE PRESENTED AT TRIAL DEMONSTRATED A NEXUS BETWEEN THE ATTEMPTED EXTORTION AND INTERSTATE COMMERCE.

Vigil argues that the United States did not prove that his conduct affected interstate commerce. *See* Motion to Acquit at 13. He concedes, however, that the United States "presented proof at trial that[,] theoretically, the SLOM contract would have involved the oversight of brokerage firms that would lend securities for the State and that this lending would involve interstate commerce." *Id.* Nevertheless, he asserts that "the SLOM contract—whether owned by one person or split amongst two—would have had no impact at all upon the movement of securities across interstate lines." *Id.* Vigil argues that he, Everage, and Sais were all from New Mexico and that 18 U.S.C. § 1951 requires that the alleged act of extortion affect

interstate commerce. *See id.* at 13; Hearing Transcript at 30:13-15 (Bowles). Vigil contends that, because the alleged act of extortion was an attempt to cause Everage, a New Mexican, to pay Sais, another New Mexican, there was no practical effect on interstate commerce. *See* Hearing Transcript at 34:1-8 (Bowles). The United States counters that Vigil misstates the applicable standard and argues that, to sustain a Hobbs Act violation, there must only be the potential that a defendant's action will affect interstate commerce. *See id.* at 79:13-15 (Yarbrough).

The Court does not believe that the interstate commerce element can properly be given the narrow construction that Vigil applies. *See United States v. Croxford*, 170 Fed.Appx. 31, 40 (10th Cir.2006) (Browning, J.)(describing the task of identifying an effect on interstate commerce as a "modest one"); *United States v. Curtis*, 344 F.3d 1057, 1070 (10th Cir.2003)("The [Hobbs] Act 'speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.' ") (quoting *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960)). Because "the Hobbs Act is imbued with the full reach of Congress's *Commerce Clause* power . . . the government need only demonstrate a *de minimis* affect on commerce." *United States v. Mitov*, 460 F.3d at 908. Moreover, "where there is no actual effect, the government need prove only 'a realistic probability of an effect . . . on interstate commerce to bring [the extortion]' within prosecutorial

reach." *Id.* (quoting *United States v. Peterson*, 236 F.3d 848, 852 (7th Cir.2001)). The government satisfies its burden by demonstrating a *potential* effect on interstate commerce. *See United States v. Toles*, 297 F.3d 959, 969 (10th Cir.2002); *United States v. Wiseman*, 172 F.3d 1196, 1216 (10th Cir.1999).

Vigil cites two Seventh Circuit cases, *United States v. Mattson*, 671 F.2d 1020 (7th Cir.1982), and *United States v. Boulahanis*, 677 F.2d 586 (7th Cir.1982), in an effort to draw a distinction between cases involving depletion of a business' assets from those involving an individual's assets. *See* Motion to Acquit at 14. He argues these cases stand for the proposition that cases involving the depletion of personal assets are less likely to affect interstate commerce. *See id.* The Court does not believe, however, that, under the circumstances of this case, the distinction Vigil asserts is meaningful.

The defendants in *United States v. Mattson* were accused of attempting to extort $3,000.00 from Donald Anderson, Playboy Enterprises' chief electrician, in exchange for assisting Anderson acquire a supervising electrician's license from the City of Chicago. *See* 671 F.2d at 1021-23. In an attempt to save money, Playboy had requested Anderson obtain such a license so that Playboy employees, rather than commercial contractors, could perform major electrical renovations and repairs. *See id.* at 1021-22. In finding that the defendants' actions, although improper, did not establish the requisite nexus with interstate commerce, the Seventh Circuit noted that, although the Hobbs Act "is to be given an

expansive construction, . . . neither the constitutional limits on the power of the national government, nor the jurisdictional requirement of some connection with interstate commerce can be ignored." *Id.* at 1023. In reaching its result, the Seventh Circuit did not draw any distinction between personal and business assets, however; it merely did not find the extortion had any potential effect, positive or adverse, on interstate commerce. The Seventh Circuit in *United States v. Mattson* acknowledged that electrical supplies and materials might be purchased from outside of Illinois, but reasoned that, "[w]hether Playboy's own staff did the work, or Commercial Lighting was hired, the supplies would still have to be purchased outside Illinois by Playboy or Commercial Lighting." *Id.* at 1024.

In *United States v. Boulahanis*, the Seventh Circuit upheld the Hobbs Act convictions of two defendants who attempted to extort cash payments from the owner of a social club in exchange for the defendants permitting the club owner to allow gambling in the club. *See* 677 F.2d at 586. In an opinion authored by the Honorable Richard A. Posner, United States Circuit Judge, the Seventh Circuit accepted the prosecution's argument that, because these payments would deplete the assets that the club owner had to purchase coffee that he served at the club and that was shipped from out of state, the attempted extortion had the potential to affect interstate commerce. *See id.* at 590. Despite acknowledging that the club's coffee purchases amounted to approximately $68.00 per month, Judge Posner stated that "this court is committed to the view

that commerce, within the meaning of section 1951(a), is 'affected when an enterprise, which . . . customarily purchases items in interstate commerce, has its assets depleted through extortion, thereby curtailing the victim's potential as a purchaser of goods.' " *Id.* (quoting *United States v. Elders*, 569 F.2d 1020, 1025 (7th Cir.1978)).

Judge Posner distinguished *United States v. Boulahanis* from *United States v. Mattson* because the latter case "involved the extortion of money from an individual rather than a business or other enterprise." *United States v. Boulahanis*, 677 F.2d at 590. Judge Posner noted that, "[i]n general, . . . though not in every case, businesses purchase on a larger scale than individuals . . . [and therefore] extortion is *1317 likely to have a greater effect on interstate commerce when directed at businesses than at individuals." *Id.* Nevertheless, Judge Posner cautiously warned that this distinction did not preclude extortion of individuals from affecting interstate commerce: "It is true that individuals have assets just as businesses do, [and] that the depletion of an individual's assets could affect interstate commerce by causing him to buy less of some good or service which he obtains from out of state." *Id.*

Vigil suggests that, where the extortion of an individual involves only an "attenuated" or "speculative" potential of affecting an entity or group of individuals involved in interstate commerce, " 'the realistic probability' that such commerce will be affected" is diminished. Motion to Acquit at 14. Vigil cites to *United*

States v. Collins, 40 F.3d 95 (5th Cir.1994), and *United States v. Quigley*, 53 F.3d 909 (8th Cir.1995), as cases where federal appellate courts have narrowly construed the interstate commerce element in cases involving the extortion of individuals. In *United States v. Quigley*, the United States Court of Appeals for the Eighth Circuit adopted the test the United States Court of Appeals for the Fifth Circuit articulated in *United States v. Collins* for determining whether extortion of individuals violates the Hobbs Act:

> Criminal acts directed towards individuals rather than businesses may violate [18 U.S.C.] § 1951(a) only if (1) the acts deplete the assets of an individual who is directly and customarily engaged in interstate commerce, (2) the number of individuals victimized or the sum at stake is so large that there will be some cumulative effect on interstate commerce, or (3) the acts cause or are likely to cause the individual victim to deplete the assets of an entity engaged in interstate commerce.

United States v. Quigley, 53 F.3d at 910-11 (holding defendants' robbery of two individuals of eighty-cents that prevented the victims from reaching a grocery store to purchase beer that moved in interstate commerce did not affect interstate commerce). *See United States v. Collins*, 40 F.3d at 100 (holding defendant's robbery of victim's personally owned vehicle and mobile telephone—that prevented the victim from attending a business meeting and using his telephone to make business calls—did not affect interstate commerce).

Vigil takes a limited view on the potential affects of his attempted actions and argues that "[d]epletion of Mr. Everage's potential personal assets is not a matter which affects the interstate economy." *See* Motion to Acquit at 16. The Court does not agree, however, that Vigil accurately describes the scope of potential effects his actions did have, and had Everage been more amenable to Vigil's attempt, realistically could have had. Applying the Seventh Circuit's depletion-of-assets theory, the Court first notes that the amount of money at issue in Vigil's trial was considerably more than the $68.00 per month upon which the Seventh Circuit affirmed the defendants' attempted extortion convictions in *United States v. Boulahanis*. The evidence at trial indicated that Sais had expectations of receiving up to $55,000.00 per year. *See* Everage Direct Examination at 55:12-14. Moreover, the Court does not agree that the attempted extortion was limited to Everage's personal assets. To the contrary, the evidence indicates that Everage had formed a limited liability company, SECSYS, LLC, to perform the work required under the SLOM contract. *See* Professional Service Contract between the NMSTO and SECSYS, LLC (Government's Exhibit 517).

Even if the Court assumes that Vigil was attempting to extort Everage in his individual capacity, a conclusion it declines to reach, and applies the three-part test articulated in *United States v. Collins* and *United States v. Quigley*, it finds that the necessary connection with interstate commerce has been established. First, the actions were intended to deplete the assets of Everage,

an individual engaged in securities trading, an industry that necessarily involves interstate commerce. Second, the Court believes that the sums at stake—up to $55,000.00 per year at one point—were sufficiently large for a reasonable jury to determine that the depletion of those assets would have a cumulative impact on interstate commerce. Third, to the extent that Vigil's actions prevented Everage from performing the SLOM duties, those actions prevented the NMSTO, an entity involved in interstate commerce, from engaging in securities lending.

The Court believes a more persuasive analysis is reflected in the Eighth Circuit's recent decision in *United States v. Foster*, 443 F.3d 978 (8th Cir.2006). In *United States v. Foster*, the Eighth Circuit upheld the conviction of a city council member found guilty of attempted extortion under the Hobbs Act. *See id.* at 979. The defendant in *United States v. Foster*, an elected official on the city council in Pine Bluff, Arkansas, had attempted to obtain cash payments in exchange for the city council's approval of a commercial real estate development project. *See id.* at 980-81. After being solicited for money, however, the real estate developer, in cooperation with the Federal Bureau of Investigation ("FBI"), secretly recorded meetings with the defendant and therefore the extortion was never completed. *See id.*

The Eighth Circuit in *United States v. Foster* rejected the defendant's argument that the evidence underlying his attempted extortion was insufficient to

establish the requisite nexus between his actions and interstate commerce. *See id.* at 983. The Eighth Circuit observed that "because the Hobbs Act criminalizes attempt crimes, 'it is enough that the conduct . . . had the potential to impact commerce.' " *Id.* at 984. The Eighth Circuit in *United States v. Foster* noted that the defendant's attempted extortion had affected the real estate developer's project and that the evidence presented at trial indicated that the project would have involved: (i) the solicitation of contractors from across the country; (ii) ordering construction materials and supplies from sources outside of Arkansas; and (iii) financing provided through a federal agency. *See id.* Under the facts before it, the Eighth Circuit ruled that the defendant's conduct "had an actual, and certainly a potential, effect on interstate commerce." *Id.*

Everage testified that, once he signed and returned the SLOM contract to the NMSTO, the NMSTO sent him the bid proposals of three securities-lending agents with multi-state and multi-national operations—Dresdner Bank, Wachovia Bank, and Northern Bank—for him to review the agents' applications for the securities-lending agent position. *See* Everage Direct Examination at 93:13-22. Everage evaluated these agents' applications and prepared a report making recommendations to the NMSTO. *See* Securities Lending Evaluation Prepared by SECSYS, LLC (Government's Exhibit 524). Everage testified that, had a securities lending contract been executed, there certainly would have been transmission of securities and money across state lines, and companies outside of New

Mexico would have been affected. *See* Everage Direct Examination at 140:3-10. Furthermore, the United States argues that not only did Vigil's attempted extortion have the potential to affect interstate commerce, but that his attempt actually did affect interstate commerce by preventing the completion of interstate transactions that would have otherwise occurred absent his extortion. *See* Transcript at 82:4-9 (Yarbrough). The Court believes these facts are comparable to those the Eighth Circuit considered in *United States v. Foster*, and are sufficient to find that Vigil's conduct had a potential, if not actual, effect on interstate commerce.

Securities lending involves, by its very nature, transactions based upon securities, which are themselves instrumentalities of interstate commerce. Indeed, Vigil acknowledges that "[t]he government presented proof at trial that[,] theoretically, the SLOM contract would have involved the oversight of brokerage firms that would lend securities for the State and that this lending would involve interstate commerce." Motion to Acquit at 13. Nor is there any dispute that the NMSTO's securities-lending activities would have involved the solicitation of bids from out-of-state securities-lending agents. These factors are sufficient for the Court to conclude that Vigil's attempt to manipulate the execution of the NMSTO's securities-lending activity, and specifically, Everage's oversight of the securities-lending agents selection process, would have the ordinary and natural consequence of affecting commerce.

IV. VIGIL WAS ON NOTICE THAT HIS CONDUCT WAS ILLEGAL, AND HIS CONVICTION DOES NOT OFFEND DUE PROCESS.

As a final argument, Vigil contends that "[t]he Hobbs Act does not give fair warning that the facts of this particular count would violate its terms." Motion to Acquit at 15. Vigil asserts that "constitutional due process requires that 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' " Motion to Acquit at 14 (quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954)). Vigil maintains that this constitutional imperative is necessary to prevent "arbitrary and erratic arrests and convictions." Motion to Acquit at 14 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972)).

Vigil states that "[m]odification of a contract proposal to require a bidder to split the contract thereby lowering his potential compensation is not something the average citizen would understand to be a crime." Motion to Acquit at 14. Vigil argues that his conviction offends due process because it constitutes an expansion of the Hobbs Act, without fair warning, "into the world of ordinary contractual disputes." Motion to Acquit at 15. The cases Vigil cites for this proposition, *United States v. Bass*, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971), and *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), although not Hobbs Act cases, do counsel that a statute's language

must be definite enough to provide notice that the law prohibits a defendant's actions. *See United States v. Bass*, 404 U.S. at 348, 92 S.Ct. 515 ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); *McNally v. United States*, 483 U.S. at 360, 107 S.Ct. 2875 (stating that, before a defendant can be punished, "it must be shown that his case is plainly within the statute") (quoting *Fasulo v. United States*, 272 U.S. 620, 629, 47 S.Ct. 200, 71 L.Ed. 443 (1926)). The United States does not deny that criminal statutes require definiteness, but counters that Vigil's conduct falls within the Hobbs Act's plain meaning, and that, under the law, Vigil is presumed to know that it was illegal for him to attempt to extort payment to Sais.[4] *See* United States' Response at 22-23.

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4. The United States also argues that Vigil had actual knowledge that his conduct was illegal. *See* United States' Response at 22. The United States alleges that, during the time Vigil was State Auditor, he was the subject of an investigation that the New Mexico Attorney General performed regarding allegations that Vigil exchanged state contracts for personal and political contributions. *See id.*; United States' Motion in Limine Regarding Admissibility of Federal Rule of Evidence 404(b) Material at 5-6, filed August 8, 2006 (Doc. 275). In response to a motion in limine the United States filed before trial, the Court ruled evidence of this investigation inadmissible under rule 404(b) of the Federal Rules of Evidence and evidence of this investigation was not presented to the jury. *See* Memorandum Opinion and Order, filed September 1, 2006 (Doc. 330).

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Appendix C

As a general rule, a defendant cannot assert ignorance of the law as a defense to a criminal prosecution. *See Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). Moreover, the Court does not find Vigil's characterization of his activities persuasive. In reviewing a motion for acquittal, the Court must interpret the evidence in the light most favorable to the United States, and the Court believes that a reasonable jury could have found that Vigil was not merely altering contract terms, but attempting to direct payments, to which he was not entitled, to Sais.

The Hobbs Act expressly prohibits attempts to extort payments by wrongful use of threatened fear or under color of official right. *See* 18 U.S.C. § 1951(a), (b)(2). Moreover, the Court presumes that Vigil understood he had no entitlement to fees that the SLOM would have earned, and did not have a personal or official right to direct the distribution of those fees. That the lending activity was not completed is irrelevant, because

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At this stage in the proceedings, the Court recognizes that evidence of such an investigation could be relevant to determining the legal question whether Vigil had notice that his conduct was illegal. Nevertheless, on the record before it, the Court does not have enough information about the facts underlying the Attorney General's earlier investigation to make a fair comparison to those underlying Vigil's conviction necessary to assess whether Vigil had actual knowledge that the Hobbs Act prohibited his conduct. Because the Court finds that Vigil's conduct falls within the plain language of the Hobbs Act, however, it need not decide that issue at this time.

Vigil was convicted of attempted extortion; the Hobbs Act prohibits attempts to manipulate fees private entities generate and possess. Thus, even if the Hobbs Act was one of "those rare cases in which due process requires that [a defendant] have had actual notice of the prohibited behavior," the Court believes that the Act put Vigil on sufficient notice that his conduct was illegal. *United States v. Alderman*, No. CR06-0117C, 2006 U.S. Dist. LEXIS 44108, at *11 (W.D. Wash. June 27, 2006). The Court believes that this holding is also consistent with federal caselaw, particularly the Sixth Circuit's decision in *United States v. Collins*, the Second Circuit's decision in *United States v. Gotti*, and other cases that have upheld convictions premised on the extortion of intangible rights, including the right to compete for government contracts on a level playing field and the right to make business decisions free from undue influence.

The Court concludes that the evidence presented at trial was sufficient for a reasonable jury to find beyond a reasonable doubt that Vigil attempted to extort payments from Everage in violation of the Hobbs Act. Everage's reasonable expectation of some profit, his right to compete fairly for government contracts, and the right to conduct his business free from coercion all established a property interest that the jury could have determined Vigil *1321 attempted to extort either by threatening Everage with economic harm or under color of official right. In addition, the Court believes that Vigil's attempt to manipulate monies generated by securities lending—an activity involving interstate

activity—establishes the requisite nexus between Vigil's conduct and interstate commerce necessary to fall within the auspices of the Hobbs Act. Finally, the Court concludes that the Hobbs Act put Vigil on sufficient notice that his actions were illegal, and thus his conviction does not offend due process.

IT IS ORDERED that Vigil's Motion to Set Aside Verdict and for Judgment of Acquittal on Count 24 of the Fifth Superseding Indictment Under Fed.R.Crim.P. 29 or in the Alternative for New Trial on Count 24 is denied.

s/ [illegible]
UNITED STATES DISTRICT JUDGE